No. 08- 081184

In The Supreme Court of the United States

LINDEN D. BOWMAN,

Petitioner,

v.

UNITED STATES OF AMERICA
AND
ROBERT M. GATES, SECRETARY OF DEFENSE
OF THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1993, Congress enacted legislation to encourage members of the armed services to retire early from the military. As an incentive, the legislation allowed early retirees to attain credit for twenty years of military service, and a full military pension, by engaging in employment for "public and community service" organizations. However, the Secretary of Defense adopted a regulation that precluded credit for work for "organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization." This case challenges the validity of that regulation and presents the following questions:

1. Is the exclusion of religious organizations invalid as contrary to the intent of Congress in enacting the community service program?

2 Does the exclusion constitute a religion-based classification that violates the guarantee to equal protection embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

The Petitioner, Linden W. Bowman, was the sole Plaintiff-Appellant in the proceedings in the United States Court of Appeals for the Sixth Circuit.

The Appellees in the Court of Appeals were the Respondent United States of America and Donald Rumsfeld, Secretary of Defense of the United States of America. Respondent Robert M. Gates, current Secretary of Defense of the United States of America, is substituted for Secretary Rumsfeld pursuant to Fed. R. Civ. P. 25(d).

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported and is set forth in Appendix at 1a-24a. The order and opinion of the United States District Court for the Northern District of Ohio denying the government's motion to dismiss under Fed. R. Civ. P. 12(b)(1) and granting the government's motion to dismiss under Fed. R. Civ. P. 12(b)(6)) is reported as *Bowman v. United States*, 512 F. Supp. 2d 1056 (N.D. Ohio 2007), and is set forth in the Appendix at 25a-55a.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit, which is the subject of the instant petition, was entered on December 18, 2008. This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]

The Fifth Amendment to the United States Constitution provides, in relevant parts:

> No person shall be held to answer for a capital, or otherwise infamous offense, unless on a presentment or indictment of a grand jury, . . .; nor be deprived of life, liberty, or property, without due process of law[.]

The provisions of Pub. L. 102-484, §§ 4462(a)(1) and 4464, codified at 10 U.S.C. § 1143a, are set forth in the Appendix beginning at 56a.

The provisions of 32 C.F.R. §§ 77.1-77.6, are set forth in the Appendix beginning at 62a.

STATEMENT OF THE CASE

This case is a civil action seeking declaratory and injunctive relief brought by the Petitioner, Linden Bowman, against the Respondents, United States of America and the Secretary of Defense, that was filed in the United States District Court for the Northern District of Ohio. That Court had jurisdiction over this action under 28 U.S.C. §§ 1331, 1346(a)(2), 1361, and 5 U.S.C. § 702.

The complaint set forth claims against the United States of America and then-Secretary of Defense Donald Rumsfeld arising out of the implementation of a program established by Congress in 1993 to "encourage members and former members of the armed forces to enter into public and community service jobs after discharge or release from active duty." Pub. L. No. 102-484, § 4462(a)(1), 106 Stat. 2702, 2741 (1992). The legislation establishing the Community Service Program is codified at 10 U.S.C.§ 1143a (56a-58a).

Part of the legislation provided that service members who retired before they achieved 20 years of service could perform community service after their retirement from the military and have years of community service employment credited toward their years of military service for purposes of calculating the service member's military pension (First Amended Complaint, pgs. 2-3). The legislation establishing this Community Service Program defines "public service and community service organizations" as organizations providing school services and administration, law enforcement, public health care, social services, and "any other public or community service." 10 U.S.C. § 1143a(g) (58a). The legislation also instructed the Secretary of Defense to implement the program to encourage former members of the armed services to enter into public and community service jobs. 10 U.S.C. § 1143a(a).

Pursuant to this direction, the Secretary of Defense promulgated regulations for the Community

Service Program, which are set forth at 32 C.F.R. §§ 77.1-77.6 (62a-70a). Under the regulations, creditable community service employment includes work for organizations that provide "social services" and other public and community service consistent with the kind of work otherwise identified in the regulations. 32 C.F.R. § 77.3(d) (5) and (12).

However, the regulations also specifically prohibit giving retired service members credit toward retirement for employment with "organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization." 32 C.F.R. § 77.3(a) (63a). This exclusion of work for religious organizations applies, even though the work a retired service member performs constitutes social services or otherwise constitutes "public and community service" as defined in 10 U.S.C. § 1143a(g) and 32 C.F.R. § 77.3(d).

From September 1977 until January 1996, Petitioner Bowman served in the United States Air Force, achieving a final rank of Technical Sergeant (First Amended Complaint, pg. 5). Upon retirement from the Air Force in January 1996, Bowman accepted employment with the People's Church of C & MA in Geneva, Ohio. The complaint alleged that this employment constituted "public and community service" as defined in 10 U.S.C. § 1143a(g) and 32 C.F.R. § 77.3(d), and was otherwise performed at a time which would qualify the employment for credit in computing his military retirement under the

Community Service Program (First Amended Complaint, pgs. 5-6). Bowman submitted to the Department of Defense a Validation of Public or Community Service Employment form respecting his employment with the People's Church of C & MA in the latter part of 1998, seeking credit for that employment under the Community Service Program. However, Bowman never received any response to this application (First Amended Complaint, pg. 6).

On or about November 2002, Bowman submitted another Validation of Public or Community Service Employment form to the Director, Defense Manpower Data Center (hereafter DMDC), in Fort Ord, California. Bowman never received any response from the DMDC respecting his request for credit for creditable service under the Community Service Program (First Amended Complaint, pg. 6). In October 2004, Bowman, with the assistance of an attorney, again submitted the Validation of Public or Community Service Employment form to the DMDC, requesting a response about the status of the application and asking whether the inaction on the application should be considered a denial. Neither Bowman nor his attorney who wrote the letter received a response to his letter (First Amended Complaint, pgs. 6-7)

Bowman's complaint alleged that the reason his request for creditable service under the Community Service Program was neithér granted nor processed is that the work shown on his Validation of Public or Community Service

Employment form is religious in nature (First Amended Complaint, pg. 7). Bowman also alleged that but for the provisions of 32 C.F.R. § 77.3(a) excluding employment with "organizations engaged in religious activities" from the Community Service Program, Bowman would be entitled to and granted credit toward his military retirement benefits for the years of employment with People's Church of C & MA (First Amended Complaint, pg. 7). Such credit would result in Bowman receiving, upon reaching the age of 62, 50 percent of his base military pay as opposed to 42 percent of that pay without that credit (First Amended Complaint, pgs. 7-8).

The complaint went on to allege as follows:

> 31. The exclusion of employment with organizations engaged in religious activities from qualification for creditable early retirement public or community service employment under the Community Service Program is facially violative of the guarantee to equal protection of the law of the Fifth Amendment to the United States Constitution.
>
> 32. The exclusion of employment with organizations engaged in religious activities from qualification for creditable early retirement public or community service employment under the Community Service Program is

> violative of the guarantee to equal protection of the law of the Fifth Amendment to the United States Constitution as applied to the Plaintiff.
>
> 33. The exclusion contained in 32 C.F.R. § 77.3(a) of employment with organizations engaged in religious activities from qualification for creditable early retirement public or community service employment under the Community Service Program is not authorized by the provisions of 10 U.S.C. § 1143a(g) and is contrary to the purpose and intent of Congress in enabling the Defendant Secretary of Defense to promulgate regulations encouraging community service by early retirees from the armed services.

(First Amended Complaint, pg. 8).

In response to the Complaint, the Defendants filed a motion to dismiss the Complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(1) and (6). The District Court granted the Defendants' motion to dismiss the Amended Complaint for failure to state a claim, *Bowman v. United States*, 512 F. Supp. 2d 1056 (N.D. Ohio 2007) (54a-55a), and Bowman timely appealed.

On appeal, the Court of Appeals for the Sixth Circuit affirmed. That Court first held that the

exclusion set forth in 32 C.F.R. § 77.3(a) of employment with organizations engaged in religious activities is not inconsistent with the enabling legislation, 10 U.S.C. § 1143a. Although recognizing that the enabling legislation does not mention an exclusion of religious organizations (9a), the Court determined that the enabling legislation gave the Secretary "broad discretion to adopt eligibility criteria" for the Community Service Program, and so the Secretary's decision to include the exclusion should be granted deference (10a-11a). Because "[n]othing in the legislative history suggests that Congress intended to encourage retirees to accept positions which would involve "religious instructions, worship or proselytization" and "nothing in the text of the statute itself suggests that Congress intended to benefit this kind of activity," the Court concluded that the Secretary's decision to include the exclusion should be upheld (13a).

The Court of Appeals also determined that the exclusion did not violate Bowman's right to equal protection of the law as guaranteed by the Fifth Amendment. It first found that the exclusion was not subject to strict judicial scrutiny because Bowman had "not shown that his fundamental right to free exercise of religion had been violated." (19a). The Court held that this Court's ruling in *McDaniel v. Paty*, 435 U.S. 618 (1978), applying strict scrutiny to a state law disqualifying clergy from participating in state constitutional conventions was not apposite because *McDaniel* involved a clergyman's "right to participate in the political affairs of the community."

(15a). It also held that this Court's rulings applying strict scrutiny to denials of public benefits to persons because of the person's religious beliefs, *see, e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963), were not apposite because "any loss of an incremental increase in his retirement pay burdened him much less than losing unemployment compensation altogether." (17a). Instead, the Court of Appeals determined that this case was controlled by *Locke v. Davey*, 540 U.S. 712 (2004), in that the Secretary's regulations merely evinced a decision not to fund a category of public service work. It reasoned that "[t]he breadth of the exclusion suggests that the Secretary was not discriminating along religious lines." (19a).

Applying "rational basis" scrutiny, the Court of Appeals upheld the Secretary's exclusion. It accepted the government's argument that the exclusion was "necessary to comport with Congressional intent to limit community service credit to those serving in education, law enforcement, and public health." (23a).

REASONS FOR GRANTING THE WRIT

I. THE EXCLUSION OF EMPLOYMENT WITH ORGANIZATIONS ENGAGED IN RELIGIOUS ACTIVITIES IS CONTRARY TO THE PURPOSE AND INTENT OF THE LEGISLATION ESTABLISHING THE COMMUNITY SERVICE PROGRAM.

The Community Service Program under which Bowman seeks credit toward his military service in determining his retirement benefits was authorized by Congress when it enacted 10 U.S.C. § 1143a(g). The authorizing legislation unambiguously defines "public service and community service organizations" as follows:

> (1) Any organization that provides the following services:
>
> (A) Elementary, secondary, or postsecondary school teaching or administration.
>
> (B) Support of such teaching or school administration.
>
> (C) Law enforcement.
>
> (D) Public health care.
>
> (E) Social services.
>
> (F) Any other public or community service.
>
> (2) Any nonprofit organization that coordinates the provision of services described in paragraph (1).

10 U.S.C. § 1143a(g). Congress included no language excluding work for religious organizations and institutions in determining what post-retirement employment should be eligible as creditable service.

When reviewing the authority to promulgate a regulation, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously

expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984).

The provisions of 32 C.F.R. § 77.3(a), which prohibit giving retired service members credit toward retirement for employment with "organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization," clearly is not authorized by the legislation. Indeed, the exclusion disqualifies work, such as that performed by Bowman in his capacity as a youth pastor, that constitutes "social services" and "public or community service" that is specifically within the ambit of qualifying work under the plain terms of 10 U.S.C. § 1143a(g).[1] The exclusion fails to give effect to the plain terms used by Congress and must be found to be manifestly contrary to the statute.

That the exclusion is contrary to the intent of Congress is supported by the fact that where

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[1] The Amended Complaint specifically alleged that Bowman's work as a youth pastor constituted "public and community service" within the meaning of 10 U.S.C. § 1143a(g) (First Amended Complaint, pg. 6). *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader).

Congress has intended to impose such a restriction or exclusion, it has done so explicitly. *See, e.g.*, 42 U.S.C. § 300x-65(i) ("[n]o funds provided through a grant or contract to a religious organization to provide services under any substance abuse program under this title or title V shall be expended for sectarian worship, instruction, or proselytization."), 29 U.S.C. § 2938(a)(3) ("[p]articipants shall not be employed under this title to carry out the construction, operation, or maintenance of any part of any facility that is used or to be used for sectarian instruction or as a place for religious worship"), and 42 U.S.C. § 9920(c) ("[n]o funds provided directly to a religious organization to provide assistance under any program described in subsection (a) shall be expended for sectarian worship, instruction, or proselytization."). This serves only to emphasize that when Congress intended such a restriction to exist, it expressly imposed or authorized the restriction.

Although the Court of Appeals wrote that "too much should not be made of Congressional silence," (10a), "'where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed.'" *Richerson v. Jones*, 551 F.2d 918, 928 (3d Cir. 1977) (quoting *General Electric Co. v. Southern Construction Co.*, 383 F.2d 135, 138 n. 4 (5th Cir. 1967)). The absence of a religious organization restriction from 10 U.S.C. § 1143a(g) speaks volumes in this case.

In upholding the exclusion as authorized and consistent with 10 U.S.C. § 1143a, the Court of Appeals repeatedly cited to the "broad power" (8a) and "broad discretion" (10a) granted by the legislation to the Secretary of Defense to determine what organizations qualify under the community service program. But one must search in vain for any language in 10 U.S.C. § 1143a granting broad discretion or power to the Secretary. Indeed, the statute provides simply that the Secretary "shall implement a program to encourage" service members to enter into community service. The section of the legislation defining "public service and community service organizations," 10 U.S.C. § 1143a(g), does not contain any additional language authorizing the Secretary to limit or define the organizations that qualify under the program.

To the extent the Court of Appeals determined that it must assume such "broad discretion" because of this Court's decision in *Chevron, U.S.A. v. NRDC, Inc.*, *supra*, regarding the deference courts are to afford agencies in the interpretation of statutes, it also plainly erred. The deference required under *Chevron* is inapplicable when the agency action does not involve the exercise of any agency expertise in the implementation of stated Congressional policy. Thus, this Court pointed out that the principle of deference to administrative interpretations

> "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has

> involved reconciling conflicting policies, **and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations**. See, *e. g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190; *Labor Board v. Hearst Publications, Inc.*, 322 U.S. 111; *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793; *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194; *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344.

Chevron, U.S.A., Inc., 467 U.S. at 844-45 (quoting *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961)) (emphasis added). "The special deference required by *Chevron* is based on the expertise of an administrative agency in a complex field of regulation with nuances perhaps unfamiliar to the federal courts." *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998).

While the Secretary of Defense certainly has special knowledge relating to the execution of military operations and the administration and operation of the armed services, there is nothing to support the idea that the Secretary or the Department of Defense has any particular expertise in public service organizations, which organizations provide social, public or community service, or what

areas of community service need particular assistance. Indeed, it is evident that the exclusion of religious organizations was included not because of the conclusion that religious organizations do not provide "public or community service" but because of the mistaken conclusion that the exclusion was required by the Establishment Clause.[2]

Moreover, judicial deference to the regulation promulgated by the Secretary is not warranted under *Chevron* because the legislation at issue here did not leave it to the Secretary to fill gaps or elucidate general standards. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), this Court made clear that not all administrative actions are entitled to the deference articulated in *Chevron*, but the degree of deference varies with the circumstances of each case. *Mead Corp.* held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226-27. Such authority is generally found when the agency acts through notice-and-comment rulemaking or adjudication. "It is fair to assume . . . that

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[2] In the District Court, the Respondents argued only that the purpose of the exclusion was to avoid Establishment Clause problems, but conceded on appeal that the exclusion was not required by the Establishment Clause.

Congress contemplates administrative action with the effect of law when it provides for relatively formal administrative procedure[.]" *Mead Corp.*, 533 U.S. at 230.

The regulation at issue here did not result from any formalized administrative process, nor was it the result of Congressional legislation delegating to the Secretary of Defense the task of "filling gaps" left by the legislation. The community service program legislation simply instructed the Secretary of Defense to "implement" the program, 10 U.S.C. § 1143a(a), and defined the characteristics of "public service and community service organizations." 10 U.S.C. § 1143a(g). Congress did not instruct the Secretary to implement the program through rulemaking or adjudication, nor was it actually implemented through those processes. Thus, this is not a case where Congress intended any regulations of the Secretary to "speak with the force of law," *Mead Corp.*, 533 U.S. at 229, such that *Chevron*-type deference is required.

Congress clearly meant for the program to be broadly available for public or community service work because 10 U.S.C. § 1143a(g) lists not only "teaching," "[l]aw enforcement," and "[p]ublic health care," but also "[s]ocial services" and "[a]ny other public or community service" as the kind of services an organization may provide in order to qualify under the Community Service Program. The exclusion of religious organizations set forth in 32 C.F.R. § 77.3(a) is unnecessary and not even hinted

at by any provision of the legislation. It is contrary to the plain intention of the enabling legislation not to allow persons retiring from the military credit for all "community" or "social services" performed within the established time limits after leaving the military. Therefore, the judgment of the Court of Appeals upholding the regulation should be reversed.

II. THE RELIGIOUS ORGANIZATIONS ACTITIVITIES EXCLUSION IN THE COMMUNITY SERVICE PROGRAM REGULATION VIOLATES THE FIFTH AMENDMENT'S GUARANTEE TO EQUAL PROTECTION OF THE LAW.

The exclusion contained in 32 C.F.R. § 77.3(a) prohibiting Bowman and other retired service members from receiving credit toward retirement for employment with "organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization" establishes a classification that is subject to scrutiny under the guarantee to equal protection of the law contained in the Fifth Amendment. *See Adarand Constructors v. Pena*, 515 U.S. 200, 217 (1995) (Fifth Amendment's Due Process Clause embodies equal protection guarantee equivalent to the Fourteenth Amendment's Equal Protection Clause). Bowman's allegations in the Amended Complaint set forth facts showing that the exclusion treats similarly situated persons differently and that such disparate treatment is not justified.

Village of Willowbrook v. Olech, 528 U.S. 562, 564-65 (2000).

The Court of Appeals determined that the classification set up by the exclusion does not violate the Fifth Amendment's guarantee, ruling (1) that the classification was not subject to strict scrutiny even though it is based upon religion (21a), and (2) the distinction drawn survives rational basis scrutiny because the exclusion is "necessary to comport with Congressional intent to limit community service credit to those serving in education, law enforcement and public health" (23a). Each of these rulings is erroneous and requires that the judgment below be reversed.

A. The exclusion is subject to strict scrutiny because it is a classification based upon religion and burdens the exercise of religion.

Bowman alleged in his Amended Complaint that the work he performed as a youth pastor at the People's Church of C & MA between January 1996 and February 2001 constituted public and community service of the kind described in 10 U.S.C. § 1143a(g) and 32 C.F.R. § 77.3(d) (First Amended Complaint, pg. 6). The legislation (Pub. L. 102-484, § 4464 and 10 U.S.C. § 1043) and regulations allow military retirees to obtain credit for work for organizations that provide "social services" and other public and community service consistent with the kind of work otherwise identified in the regulations.

32 C.F.R. § 77.3(d)(5) and (12). It was only because Bowman's work was for a religious organization and had a religious component to it that he is not eligible for the benefit granted to other retirees under the Community Service Program (First Amended Complaint, pg. 7).

Where a classification affecting the eligibility for benefits is based upon religion, the classification burdens the exercise of religion and is subject to strict scrutiny in an equal protection challenge. Thus, in *McDaniel v. Paty*, 435 U.S. 618 (1978), this Court unanimously struck down a Tennessee statute that disqualified clergymen from participation in state constitutional conventions, writing as follows:

> [T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister of the type McDaniel was found to be. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Tennessee also acknowledges the right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention. . . . Yet under the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has

> conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is "punishing a religious profession with the privation of a civil right." 5 Writings of James Madison, supra, at 288. In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. "[To] condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

McDaniel, 435 U.S. at 626.

In a concurring opinion, Justice Brennan wrote that the law established a religious classification that was absolutely prohibited and that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *Id.* at 639 (Brennan, J., concurring).

The exclusion at issue here makes precisely the kind of religious classification that was found to burden the free exercise of religion in *McDaniel*. Under equal protection jurisprudence, strict scrutiny applies where a classification trammels fundamental

personal rights or is drawn upon inherently suspect distinctions such as race or religion. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). *See also Employment Div. v. Smith*, 494 U.S. 872, 886 n. 3 (1990) (courts are required to strictly scrutinize governmental classifications based on religion). The Court of Appeals should have applied strict scrutiny and demanded that the Defendants identify a compelling interest justifying the exclusion.

Instead, the lower courts distinguished *McDaniel,* indicating that the principle enunciated there applies only where a religious classification affects a person's right to participate in the political affairs of the community (15a, 45a). But *McDaniel* is not so limited; both the plurality opinion and Justice Brennan's concurrence in *McDaniel* indicated that religion cannot be the basis for a classification affecting *the receipt of government benefits* (except where there is some compelling government interest supporting the classification). Indeed, the *McDaniel* plurality cited *Sherbert v. Verner*, *supra*, which held that a denial of unemployment benefits to a person because her religious beliefs prevented her from working on Saturdays constituted a burden on the exercise of religion that must be supported by a compelling interest in order to survive a legal challenge. This Court rejected the state's defense that the ability to collect unemployment is a privilege, not a right, writing that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

Sherbert, 374 U.S. at 404. Thus, the fundamental right to free exercise is burdened where religion is the basis for a classification affecting the receipt of benefits.

The Court of Appeals also distinguished *Sherbert*, asserting that "any loss of an incremental increase in his retirement pay burdened him much less than losing unemployment compensation altogether" (17a). But it cited no support for the idea that the protections of the Fifth Amendment against facially discriminatory classification traditionally subject to strict scrutiny are triggered only by discrimination with "severe" economic consequences. Moreover, the Court had no grounds for concluding that the actual loss Bowman will suffer from his retirement pay, which he is to receive for the remainder of his lifetime once he reaches age 62, would be marginal.

The lower court also erred in ruling that Bowman was not put to the choice between exercising his religious beliefs and receiving a government benefit. His beliefs led him to choose the ministry, and by doing so he forfeited any chance of receiving public and community service credit toward his retirement. *See Sherbert*, 374 U.S. at 405 (conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms). Again, *McDaniel*, 435 U.S. at 626 (quoting *Sherbert*, 374 U.S. at 406), pointed out that conditioning a benefit on a person's "'willingness to

violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties.'" Indeed, the concurring opinion authored by Justice Brennan and joined by Justice Marshall stressed that "Tennessee's political exclusion [cannot] be distinguished from the *Sherbert*'s welfare disqualification[.]" *McDaniel*, 435 U.S. at 634 (Brennan, J., concurring).

The courts below also placed great reliance upon *Locke v. Davey*, 540 U.S. 712 (2004), but *Locke* is distinguishable on numerous grounds. In that case, this Court found that the state scholarship program at issue was not sufficiently hostile to religion because it did not require persons to choose between their religious beliefs and receiving a government benefit. *Id.* at 720-21. As pointed out above, a classification requiring one to forego the ministry as a condition of receiving a government benefit does compel such a choice. Additionally, this is not a case where the program "goes a long way toward including religion in its benefits." *Locke*, 540 U.S. at 724. Under the regulation at issue, any work for an organization that engages in religious instruction, religious services or proselytization is disqualified. Thus, this case is unlike *Locke*, where the program was sufficiently neutral toward religion.

The Court of Appeals' reliance on *Johnson v. Robinson*, 415 U.S. 361 (1974), to sustain the exclusion also is misplaced. *Johnson* upheld legislation that did not extend veteran educational

benefits to conscientious objectors who performed alternative service during wartime. This Court found that the classification was not subject to strict scrutiny because the legislation did not evince an intention to exclude persons on the basis of religion. *Johnson*, 415 U.S. at 385. By contrast, the regulation at issue here specifically bases the exclusion on religion and so clearly intentionally discriminates on the basis of religion. Moreover, *Johnson* found no constitutional problem with denying benefits to conscientious objectors because of the government's "substantial interest" in raising and supporting armies justified the burden on conscientious objectors religious rights. *Id.* As discussed, *infra*, there is no similar substantial interest justifying the exclusion set forth in 32 C.F.R. § 77.3(a).

Under 32 C.F.R. § 77.3(a), employment in the service of a religious organization is disqualified from eligibility in the Community Service Program, even though that employment otherwise constitutes public or community service. This classification on the basis of religion is inherently suspect and subject to strict scrutiny. The lower courts' failure to apply strict scrutiny and require the Defendants to articulate a compelling interest for the exclusion was error requiring reversal of the judgment below.

For the reasons discussed *infra*, the exclusion must be found to fail strict scrutiny because the sole basis for the exclusion articulated by the Defendants does not survive even rational basis scrutiny. The Defendants abandoned any claim that the exclusion

was required to comport with the Establishment Clause.

B. The exclusion of religious activities from the Community Service Program is not rationally related to any conceivable governmental purpose.

Even if the classification made by 32 C.F.R. § 77.3(a) is judged under the rational basis standard test of equal protection, the Defendants' request that Bowman's claim be dismissed still must fail. Although the government is generally allowed to make classifications of persons, the constitutional guarantee to equal protection denies the government "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)." *Johnson*, 415 U.S. 374-375 (quoting *Reed v. Reed*, 404 U.S. 71, 75-76 (1971)). The government may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

The Defendants and Court of Appeals articulated a single justification for the exclusion of religion-related employment from the Community Service Program; because Congress intended to limit public and community service credit to persons serving in education, law enforcement and public health, the exclusion was necessary to comport with this legislative intent (23a).

However, the plain terms of 10 U.S.C. § 1043a refute the idea that Congress limited retirement credit eligibility to work for education, law enforcement, and health care organizations. Congress specifically defined "public and community service organizations" as including, in addition to the categories listed by the Defendants, organizations providing "social services" and "any other public or community service." 10 U.S.C. § 1043a(g)(1) (E) and (F). Congress clearly meant for the program to be broadly available for public or community service work because 10 U.S.C. § 1143a(g) lists not only "teaching," "[l]aw enforcement," and "[p]ublic health care," but also "[s]ocial services" and "[a]ny other public or community service" as the kind of services an organization may provide in order to qualify under the Community Service Program. If anything, the statutory language demonstrates that the scope of qualifying organizations was intended to be broader than simply those involved in education, health care, and law enforcement.

Moreover, the Defendants' contention that the regulation reflects the supposed Congressional intent

to limit the Community Service Program to so-called "critical need" organizations is similarly refuted by the terms of the regulation. Eligible organizations under 32 C.F.R. § 77.3(d) include not only those providing education, law enforcement, and health care, but also include "social services," "public safety," "emergency relief," "public housing," "conservation," "environment," "job training," and "other public and community service . . ., consistent with or related to services described in paragraphs (d)(1) through (11) of this section." *Id.*, § 77.3(d) (5)-(12).

The Secretary of Defense's actual regulation clearly reflects an understanding of the scope of 10 U.S.C. § 1043a that is far broader than the limited scope now professed as a justification for the religious organization exclusion. The Defendants' arguments concerning Congressional intent appear disingenuous, given the fact that the actual scope of the regulation does not coincide with the supposed legislative intent to limit the program to education, law enforcement, and health care organizations. *See also* 59 Fed. Reg. 15673 (April 4, 1993) (noting in the notice of proposed rulemaking that the purpose of community service registry is "to encourage separating Service members to enter into public and community service job vacancies, such as in education, *conservation, environmental protection*, law enforcement, and public health care after separation from active duty) (emphasis added).

The guarantee to equal protection requires that when a law or regulation singles out a particular class for different treatment, there must be some real distinction justifying the different treatment. *Johnson*, 415 U.S. at 374-375. Simply because Bowman worked for a religious organization in a religious capacity is no basis for the conclusion that his service was distinguishable in any relevant respect from other social, public, and community service that qualifies for credit under the Community Service Program. Therefore, the exclusion is irrational and should be struck down.

CONCLUSION

For the reasons set forth above, the Petitioner, Linden S. Bowman, respectfully requests that the instant Petition be granted and that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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No. 08- _____

In The Supreme Court of the United States

LINDEN D. BOWMAN,

Petitioner,

v.

UNITED STATES OF AMERICA
AND
ROBERT M. GATES, SECRETARY OF DEFENSE
OF THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

APPENDIX

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NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-4322

LINDEN BOWMAN,	)	**FILED**
Plaintiff-Appellant,	)	DEC 18 2008
	)	LEONARD GREEN,
v.	)	CLERK
	)	
UNITED STATES,	)	
Defendant-Appellee.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: GIBBONS and COOK, Circuit Judges; and STEEH, District Judge.*

GEORGE CARAM STEEH District Judge. This lawsuit arises from plaintiff Linden Bowman's early retirement from the United States Air Force and his failed attempt to participate in a program that would allow him to have community service work count toward his years of service needed to obtain a full twenty-year military retirement. The Secretary of Defense failed to process his request for military service credit for his work as a youth

* The Honorable George Carem Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

minister on grounds that the regulations specifically prohibit credit for employment with "religious organizations engaged in religious activities, unless such activities are unrelated to religious instruction, worship services, or any form of proselytization." Bowman claims the regulation violates the express language of the enabling legislation and is unconstitutional on its face and as applied to him in violation of his Fifth Amendment Equal Protection rights. The district court dismissed his complaint for failure to state a claim. Bowman now appeals that dismissal.[1] Because we find the regulation is consistent with the enabling statute and does not violate Bowman's equal protection rights, we AFFIRM.

BACKGROUND

Bowman served in the United States Air Force from September, 1977 until January, 1996, when he took an early retirement as part of a reduction in force. Bowman received a final rank of Technical Sergeant. Because Bowman was just a few years shy of the twenty-years required for a full retirement, he was eligible to participate in a program ("Program") allowing him to perform community service that would be counted toward his years of military service for retirement. The Program was provided by the

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[1] Two amicus briefs have been filed. Americans United for Separation of Church and State (AUSCS) has filed an amicus brief in support of the government. The National Legal Foundation (NLF) has filed an amicus brief in support of Bowman.

National Defense Authorization Act for Fiscal Year 1993 which directed the Secretary of Defense to "implement a program to encourage members and former members of the armed forces to enter into public and community service jobs after discharge or release from active duty." *See* Pub.L. No. 102-484, § 4462(a)(1), 106 Stat. 2702, 2741 (1992), codified at10 U.S.C. § 1143a ("Statute"). Section 1143a is entitled "Encouragement of postseparation public and community service."[2] The Statute defines "public service organizations" as organizations providing school services and education administration, law enforcement, public health care, social services and "[a]ny other public or community service."10 U.S.C § 1143a(g).

The Secretary of Defense promulgated regulations for the Community Service Program. 32 C.F.R. §§ 77.1-77.6. The Program authorized service members who retired from active duty with at least 15 but fewer than 20 years of service to accrue additional retirement credit for work in a qualified public or community service organization. 32 C.F.R. § 77.3(c). The regulations permit qualified former military personnel to accrue additional service credit for retirement through employment with "public or community service organization[s] that provide the services listed in sections 77.3(d)(1) through (d)(12)." 32 C.F.R. § 77.4(b)(2). Section 77.3(d) paints with a

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[2] Section 1143a is a section of the Defense Conversion, Reinvestment, and Transition Assistance Act of 1992 (the "Act"), which was Division D of the National Defense Authorization Act for Fiscal Year 1993.Pub.L. 102-484.

very broad brush the types of public and community service organizations for which retirement credit is allowed:

(d) Public and community service organization. Government or private organizations that provide or coordinate the provision of the following services[:]
(1) Elementary, secondary, or post secondary school teaching or administration.
(2) Support of teachers or school administrators.
(3) Law enforcement.
(4) Public health care.
(5) Social services.
(6) Public safety.
(7) Emergency relief.
(8) Public housing.
(9) Conservation.
(10) Environment.
(11) Job training.
(12) Other public and community service not listed previously, but consistent with or related to services described in paragraphs (d)(1) through (11) of this section.

32 C.F.R. § 77.3(d)(1)-(12). The regulations bar credit toward retirement for employment with "organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization."32 C.F.R. § 77.3(a). The regulations also exclude "businesses organized for profit, labor unions, [and] partisan political organizations." *Id.*

At the time of his retirement, Bowman had 17 years and three months of service in the Air Force. After retiring from the Air Force, Bowman began employment with the People's Church of C & MA ("Church") in Geneva, Ohio, first as a lay intern, and later as a youth minister. He does not dispute that his duties included religious instructions, worship services, or proselytization. The complaint does not elaborate on what his duties were either as a lay intern or as a youth minister. Bowman was employed with the Church continuously from his retirement until February, 2001. Bowman contends that this employment should be counted toward his years of service so that he is entitled to a full retirement. According to his complaint, if he were granted the retirement credit for his work as a youth minister, he would be entitled to receive 50 percent of his base military pay upon reaching the age of 62, as opposed to receiving only 42 percent of his base military pay. The complaint does not quantify the money difference.

Bowman alleges that he filed for military service credit under the Program "late in the year 1998," again in November, 2002, and again in October, 2004, this time with the assistance of counsel, by submitting a Validation of Public or Community Service Employment Form to the Defense Manpower Data Center. Neither plaintiff nor his counsel has ever received a response. Plaintiff alleges that his request for creditable service has not been granted or even processed because the form shows that his employment was with a religious

organization. Bowman alleges that the exclusion of employment with organizations engaged in religious activities from qualification for creditable early retirement under the Program conflicts with the broadly drafted enabling legislation, 10 U.S.C. § 1143a, and is unconstitutional on its face and as applied to him in violation of his Fifth Amendment Equal Protection rights.

ANALYSIS

A. Standard of Review

Whether or not a district court properly dismissed a complaint for failure to state a claim under Rule 12(b)(6) is subject to *de novo* review. *Ass'n of Cleveland Fire Fighters v. City of Cleveland,* 502 F.3d 545, 548 (6th Cir.2007). Under the Supreme Court's recent articulation of the Rule 12(b)(6) standard in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1964-65 (2007), the Court must construe the complaint in favor of the plaintiff, accept the allegations of the complaint as true, and determine whether plaintiff's factual allegations present plausible claims. To survive a Rule 12(b)(6) motion to dismiss, plaintiff's pleading for relief must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Ass'n of Cleveland Fire Fighters,* 502 F.3d at 548 (quoting *Twombly,* 127 S.Ct. at 1964-65).

An agency must interpret its implementing legislation in a reasonable manner and may not "promulgate regulations in a manner that are arbitrary or capricious in substance, or manifestly contrary to the statute." *Clark Reg'l Med. Ctr. v. United States Dep't of Health & Human Res.*, 314 F.3d 241, 244-45 (6th Cir.2002). Where Congress empowers an agency to enact rules and regulations necessary to carry out an Act, those regulations are to be upheld "so long as [they are] reasonably related to the purposes of the enabling legislation.'" *Jackson v. Richards Med. Co.*, 961 F.2d 575, 585 (6th Cir.1992) (quoting *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973)).

B. The regulation comports with the statute and Congressional intent

Bowman argues that the regulatory exclusion in 32 C.F.R. § 77.3(a) is not authorized by the enabling legislation, 10 U.S.C. § 1143a, and is contrary to the purpose and intent of Congress in establishing the Program. The government, on the other hand, argues that the regulatory exclusion is authorized by § 1143a, is supported by the legislative history, and is entitled to substantial deference under *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council Inc.*, 467 U.S. 837, 844 (1984). For the reasons discussed below, the district court properly held that the regulatory exclusion contained in 32 C.F.R. § 77.3(a) is consistent with the authorization provision of 10 U.S.C. § 1143a.

In deciding whether the regulatory exclusion conflicts with the statutory enactment, 10 U.S.C. § 1143a(g), the proper starting point is the enabling legislation itself. 10 US.C. § 1143a(a) provides:

> **1143a. Encouragement of postseparation public and community service**
>
> **(a) In general**. The Secretary of Defense shall implement a program to encourage members and former members of the armed forces to enter into public and community service jobs after discharge or release from active duty.

Id. This enabling legislation gives the Secretary broad power to implement the Program. Congress defined community service organizations as set forth below:

> (g) **Definitions**.-In this section, the term "public service and community service organization" includes the following organizations:
> (1) Any organization that provides the following services:
> (A) Elementary, secondary, or postsecondary school teaching or administration.
> (B) Support of such teaching or school administration.

> (C) Law enforcement.
> (D) Public health care.
> (E) Social services.
> (F) Any other public or community service.
> (2) Any nonprofit organization that coordinates the provision of services described in paragraph (1).

The statute is silent on the issue of whether or not work for a religious organization is exempt. The Secretary's challenged regulation, 32 C.F.R. § 77.3(a), allows early retirees to participate in the Program when they work for nonprofit organizations engaged in religious activities "if the activities are unrelated to religious instructions, worship services, or any form of proselytization."

Bowman contends that Congress would have spoken on the issue if it had intended to exclude certain work in religious activities as it has done so explicitly in other legislation. For example, Bowman cites to three statutes that the district court relied upon in its analysis that the regulatory exclusion was needed to avoid a violation of the Establishment Clause of the First Amendment. *Bowman v. United States,* 512 F.Supp.2d 1056, 1069 (N.D.Ohio 2007). In each of those Acts, Congress specifically prohibited government funds from being used for sectarian purposes. *See* 42 U.S.C. § 300X-65(i) ("No funds provided through a grant or contract to a religious organization to provide services under any substance abuse program under this subchapter or subchapter

III-A of this chapter shall be expended for sectarian worship, instruction, or proselytization"); 29 U.S.C. § 2938(a)(3) ("Participants shall not be employed under this chapter to carry out the construction, operation, or maintenance of any part of any facility that is used or to be used for sectarian instruction or as a place for religious worship"); and 42 U.S.C. § 9920(c) ("No funds provided directly to a religious organization to provide assistance under any program described in subsection (a) of this section shall be expended for sectarian worship, instruction, or proselytization"). Bowman argues that because Congress has explicitly forbidden using public funds to support a religious organization for sectarian worship, instruction, or proselytization in other instances, the fact that it did not do so under § 1143a must be construed to mean that Congress did not intend for any restriction to apply. Bowman makes too much of Congressional silence.

Congress endowed the Secretary with broad discretion to adopt eligibility criteria for participation. The government contends that drawing an inference from Congressional silence is inappropriate because the Secretary's regulations reasonably construe statutory terms left undefined by Congress in a manner supported by the legislative history. The government argues that an inference may not be drawn from Congressional silence where the inference "is contrary to all other textual and contextual evidence of congressional intent." *Burns v. United States,* 501 U.S. 129, 136 (1991). The government contends that since the enabling statute

specifically allows the Secretary to define the activities which qualify for a retirement credit, the Secretary is entitled to substantial deference for those regulations. In *Chevron,* the Court held that where Congress has explicitly given an agency the power to elucidate a specific provision of a statute by regulation, the regulation must be upheld unless it is "arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844.

The first question for the Court in deciding whether or not the Secretary's interpretation of § 1143a as set forth in 36 C.F.R. § 77.3(a) is permissible is " 'whether Congress has directly spoken to the precise question at issue' by employing precise, unambiguous statutory language." *Alliance for Cmty. Media v. F.C.C.,* 529 F.3d 763, 776-77 (6th Cir.2008) (quoting *Chevron,* 467 U.S. at 842). Where Congress has spoken in unambiguous terms, the inquiry ends and the court must "give effect to the unambiguously expressed intent of Congress." *Jewish Hosp., Inc. v. Sec'y of Health & Human Serv's,* 19 F.3d 270, 273 (6th Cir.1994). Congress's definition of "public and community service organization" is vague and leaves a gap for the Secretary to fill. This is especially true given the myriad of organizations, public and private, offering various services of value to the community.

Since § 1143a(g) is ambiguous, the second prong of the *Chevron* analysis comes into play, and the Court must determine if the Secretary's interpretation of the statute is reasonable. *Alliance*

for Cmty. Media, 529 F.3d at 778. The Court is guided by the specific language of the provision at issue and its legislative history. *Id.* The second *Chevron* prong requires the court to decide if the regulation represents a "permissible construction of the statute," and substantial deference is given to the agency's interpretation. *Estate of Gerson v. Comm'r of Internal Revenue,* 507 F.3d 435, 438 (6th Cir.2007), *cert. denied,* --- U.S. ----, 128 S.Ct. 2502 (2008) (quoting *Chevron,* 467 U.S. at 842-43); *Harris v. Olszewski,* 442 F.3d 456, 466 (6th Cir.2006).

The government argues that the exemption is compelled by Congressional intent to benefit only a very narrow class of community service organizations, namely, those involved in education, law enforcement, and health care. The district court based its decision on this distinction. The government relies on the Senate Report which specifically provides that the purpose of the legislation is to "authorize active duty personnel who are approved for early retirement to accrue additional military retirement credit if they take critical jobs, such as in education, law enforcement, and health care."Senate Committee on Armed Services, National Defense Authorization Act for Fiscal Year 1993, S.Rep. No. 102-352, at 202 (1992). The government contends that the emphasis on "critical job vacancies" in "education, law enforcement, and health care," is in harmony with the Secretary's exclusion of work for a religious organization if it involves "religious instructions, worship services, or any form of proselytization."

Bowman, however, asserts that the exclusion is at odds with the expansive language of § 1143a(g) which includes credit for organizations involved in "social services" and "any other public or community service." Nothing in the legislative history suggests that Congress intended to encourage retirees to accept positions which would involve "religious instructions, worship or proselytization." Similarly, nothing in the text of the statute itself suggests that Congress intended to benefit this kind of activity. Under these circumstances, deference is owed to the Secretary of Defense who, through his regulations, has excluded from § 1143a(g)'s definition of service all activities involving "religious instructions, worship or proselytization." Accordingly, the district court properly held that the regulatory exclusion contained in 32 C.F.R. § 77.3(a) does not violate 10 U.S.C. § 1143a(g).[3]

C. The regulation does not violate Bowman's right to equal protection

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[3] Bowman argues, by way of a footnote, that his allegation that his work as a youth minister constituted "public and community service" within the meaning of 10 U.S.C. § 1143a(g) must be taken as true for purposes of a Rule 12(b)(6) motion. Bowman is incorrect. His allegation is not a factual assertion but a legal conclusion which we need not accept. *See e.g., Gahafer v. Ford Motor Co.*, 328 F.3d 859, 861 (6th Cir. 2003); *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

The district court also dismissed Bowman's complaint on the grounds that 32 C.F.R. § 77.3(a) did not violate his equal protection claim both on its face and as applied to him. Since Bowman did not set forth any facts challenging the application of the statute to him, the district court properly found that his as-applied and facial claims were one and the same and analyzed them as such. The district court correctly recognized that equal protection applies to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe,* 347 U.S. 497, 500 (1954). The Equal Protection Clause "protects against arbitrary classifications, and requires that similarly situated persons be treated equally." *Jackson v. Jamrog,* 411 F.3d 615, 618 (6th Cir.2005) (quotations omitted).

1. Strict Scrutiny

Bowman argues that his challenge of the constitutionality of the exclusion is subject to strict scrutiny because the exclusion is a classification based on religion and burdens his free exercise of religion. To survive strict scrutiny analysis, the regulation must be narrowly tailored to advance a compelling governmental interest. An equal protection claim is subject to rational basis review unless it involves infringement of a fundamental right or application to a suspect class. *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985). Unless the Program violates Bowman's fundamental right to exercise his religion, it must be upheld as long as it bears a "rational relationship to

a legitimate state interest." *Jamrog,* 411 F.3d at 618. Strict scrutiny applies where the classification affecting eligibility for benefits is based on religion or burdens the exercise of religion. *See McDaniel v. Paty,* 435 U.S. 618, 628 (1978). The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. Laws intended to advance or inhibit religion, or having either effect, generally violate the Establishment Clause. *Agostini v. Felton,* 521 U.S. 203, 222-23 (1997).

On appeal, Bowman relies primarily on two Supreme Court cases in support of his argument that strict scrutiny analysis applies to his equal protection claim. First, he relies on *McDaniel,* in which the Supreme Court struck down a law prohibiting ministers from participating as delegates or representatives in state constitutional conventions. The Court applied strict scrutiny analysis because the law prohibiting ministers from serving as delegates and legislators at state constitutional conventions pitted plaintiff's constitutional right to the free exercise of his religion against his constitutional right to seek and hold public office. *See Id.* at 626.The district judge ruled that *McDaniel* did not apply because the regulation in dispute does not involve Bowman's right to participate in the political affairs of the community. 512 F.Supp.2d at 1066. In fact, the Supreme Court's recent decision in *Locke v. Davey,* 540 U.S. 712, 720 (2004), supports this interpretation. In *Locke,* the Court upheld the State

of Washington's constitutional prohibition against using a state scholarship toward a degree in devotional theology and distinguished *McDaniel* on the basis that the prohibition at stake was much less onerous than denial of a minister's right to participate in the political affairs of the community. *Id.* at 720, 725.

Bowman also relies on *Sherbert v. Verner,* 374 U.S. 398 (1963) to support his argument that strict scrutiny analysis applies to his constitutional challenge to 32 C.F.R. § 77.3(a). In *Sherbert,* the Court held that the denial of unemployment benefits to a person because her religious beliefs prevented her from working on Saturday constituted a burden on the exercise of religion that must be supported by a compelling state interest. *Id.* at 403-06.Since *Sherbert* was decided, the Supreme Court has held that the government cannot deny a public benefit based on a worker's religious beliefs in a number of employment cases. *See Hobbie v. Unemployment Appeals Comm'n. of Florida,* 480 U.S. 136 (1987) (strict scrutiny test applied to Florida's refusal to award unemployment compensation to claimant who was discharged for refusing to work on her Sabbath); *Thomas v. Review Bd. of Indiana Employment Sec. Div.,* 450 U.S. 707 (1981) (strict scrutiny test applied to Indiana's refusal to pay unemployment compensation to Jehovah Witness who quit his job after his employer required him to make armaments).

The facts of this case are markedly distinct from the situation presented in *Sherbert* and its progeny. Here, Bowman need not choose between exercising his religious beliefs and receiving a governmental benefit. He worked as a youth minister for pay and any loss of an incremental increase in his retirement pay burdened him much less than losing unemployment compensation altogether.

In *Locke,* the Supreme Court addressed the question of whether Washington's constitution, which prohibits public funding for any religious worship, exercise or instruction, as applied to bar state scholarships for degrees in devotional theology, violated the Free Exercise Clause. *Id.* at 719. In addressing this question, the Supreme Court noted that if the State of Washington chose to allow private recipients to use their state scholarship to pursue a degree in devotional theology, there would be no violation of the Federal Constitution. *Id.* at 719.The Ninth Circuit had ruled that the exclusion of scholarships for devotional theology degrees was subject to strict scrutiny because the state had singled out religion for unfavorable treatment. *Id.* at 718. Under strict scrutiny analysis, the Ninth Circuit ruled that the exclusion must be "narrowly tailored to achieve a compelling state interest." *Id.* The Ninth Circuit determined that the state's interest in avoiding a violation of the Establishment Clause was not compelling and held that the scholarship program was unconstitutional. *Id.*

The Supreme Court reversed, finding that prohibiting the funding of devotional degrees did not evince any religious animus toward religion. *Id.* at 725.The rationale for this conclusion is that the exclusion did not prohibit students from attending religious schools or even from taking devotional theology courses, but only barred students from pursuing a vocation in the clergy. *Id.* at 721.The Supreme Court found that excluding state funding of training for a religious profession is in keeping with the state's antiestablishment interests. *Id.* at 723-25.In reaching this conclusion, the Court reviewed several of its prior decisions in which it found laws in violation of the Free Exercise Clause and distinguished them. *Id.* at 725 (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520 (1993) (criminalizing religious ritual of animal sacrifice violates Free Exercise clause); *McDaniel, supra* (law denying ministers the right to participate in political affairs of the community unconstitutional). The *Locke* Court further ruled that the exclusion did not require students to choose between exercising their religious beliefs and receiving a government benefit, as the students were free to pursue a secular degree while obtaining a religious degree. *Id.* at 720-21 (distinguishing *Hobbie, supra; Thomas, supra;* and *Sherbert, supra*).

The Supreme Court ruled that the "State has merely chosen not to fund a distinct category of instruction" and found that decision permissible. *Id.* at 721. Although the Washington Constitution drew "a more stringent line than that drawn by the United

States Constitution," *id.* at 722, the Court still found the State of Washington's interest in avoiding the establishment of religion and its concomitant interest in avoiding funding for devotional degrees, to be "historic and substantial." *Id.* at 725. In *Locke,* the Supreme Court found that Washington's "historic and substantial" interest in avoiding an establishment of religion allowed it to choose not to fund training for religious professions, even where such funding would *not* violate the Establishment Clause. *Id.* at 725.

As in *Locke,* Bowman has not shown that his fundamental right to the free exercise of his religion has been violated. He was free to work as a youth minister but could not have that work count toward his military retirement. The regulation at issue here, 32 C.F.R. § 77.3(a), not only excludes work for religious organizations that "are unrelated to religious instructions, worship services, or any form of proselytization," but also excludes all work for "businesses organized for profit, labor unions, and partisan political organizations." The breadth of the exclusion suggests that the Secretary was not discriminating along religious lines.

As AUSCS points out in its amicus brief, this case is most analogous to the Supreme Court's opinion in *Johnson v. Robison,* 415 U.S. 361 (1974). In *Johnson,* a religiously-motivated conscientious objector to the Vietnam War sought but was denied educational benefits for veterans. *Id.* at 362-64. By statute, the government provided educational

funding to veterans who had served on "active duty" in Vietnam. *Id.* at 363.The conscientious objector was able to avoid the draft pursuant to a regulation which allowed him to perform "alternative civilian service." *Id.* at 366, n. 1. He completed two years of alternative civilian service work at a hospital. *Id.* at 364.He then brought suit alleging that his hospital service work should be counted as "active duty" toward the educational benefits and that its exclusion violated his First Amendment right to the free exercise of his religion and violated his right to equal protection under the Fifth Amendment. *Id.* at 365.

The Supreme Court addressed the question of whether the law limiting the class of persons entitled to veterans' educational benefits to those individuals who actually served in the Armed Forces, and not to those who performed "alternative civilian service" as conscientious objectors, violated the appellee's equal protection rights. *Id.* at 374.The Court applied the rational-basis test, over appellee's argument that strict scrutiny should apply, and ruled that Congress had a legitimate interest in treating those men and women who served their country through active duty in the military differently from those who served in civilian life as alternative service performers. *Id.* at 374 n. 13, 381-82. The Court identified Congress's legitimate public interest in attracting men and women to serve in the military, to provide them with incentives to give up educational and employment opportunities to do so, and to assist them in their return to civilian life, as a sufficient reason to satisfy the rational-basis test. *Id.* at 376-82.

The conscientious objector argued that denying his claim to veterans' educational benefits amounted to a violation of his right to exercise his religion freely because it increased the price he must pay to adhere to his religious beliefs. *Id.* at 383.The Court disagreed, finding that the "withholding of educational benefits involves only an incidental burden upon appellee's free exercise of religion-if, indeed, any burden exists at all." *Id.* at 385.The Court then looked at Congressional intent, which was aimed at rewarding those who served in active duty and assisting them in returning to civilian life, not to any legislative purpose to interfere with the free exercise of religion. *Id.*

Similarly, in this case, the Secretary's exclusion of different types of work from the definition of "community service" was not intended to interfere with the free exercise of religion. The withholding of a retirement credit for Bowman's work as a youth minister does not burden his right to practice or adhere to his religious beliefs. The district court properly held that strict scrutiny did not apply because the regulation did not interfere with Bowman's fundamental right to exercise his religion and was not motivated by animosity against religion.

2. Rational Basis Scrutiny

Having found that 32 C.F.R. § 77.3(a) does not interfere with Bowman's right to freely exercise his religious beliefs and that he is not a member of a

suspect class, the rational basis test applies to the question of whether the exclusion may be upheld. *Jamrog,* 411 F.3d at 618 (citing *Cleburne Living Ctr.,* 473 U.S. at 500). Rational basis review is extremely deferential. "[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313 (1993). Under the rational-basis test, the question is whether the regulation at issue is "rationally related to legitimate government interests." *Doe v. Michigan Dep't of State Police,* 490 F.3d 491, 501 (6th Cir.2007) (quoting *Washington v. Glucksberg,* 521 U.S. 720, 728 (1997)). "[C]ourts hold statutes unconstitutional under this standard of review only in rare or exceptional circumstances." *Id.* Although the standard is quite liberal, a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Johnson,* 415 U.S. at 374-75 (quoting *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920), and citing *Reed v. Reed,* 404 U.S. 71, 75-76 (1971)). For the reasons set out below, the regulation withstands the deferential rational-basis test.

The government argued before the district court that the regulation in dispute, 10 C.F.R. § 77.3(a), met the rational basis test for two reasons.

First, the government argued that the regulation comports with the alleged sole purpose of the statute, 10 U.S.C. § 1143a(g), to fill critical needs in public service organizations limited to those involving law enforcement, education, and public health. Secondly, the government argued that the regulation was rationally related to the government's interest in avoiding an Establishment Clause violation. The district court held that the exemption of 32 C.F.R. § 77.3(a) withstood rational basis scrutiny under both arguments. The government has now abandoned the Establishment Clause violation argument; thus, this court need not address it.

The district court did not err in holding that the regulatory exclusion was necessary to comport with Congressional intent to limit community service credit to those serving in education, law enforcement, and public health. The government posits that the regulations easily pass scrutiny under the rational-basis test since they limit the class of activities that can support a group of a PACs retirement credit to the group Congress identified. Nothing in the statute itself or the legislative history suggests that a retirement credit should be given for a retiree whose work for a religious organization involves religious instructions, worship or proselytization. As the district court properly found, the regulation is rationally related to limiting the retirement credit to jobs which fill "critical needs" in the community, such as in education, law enforcement, and health care.

CONCLUSION

The regulation, 32 C.F.R. § 77.3(a), conforms with the definition of "community service" set forth in the statute, 10 U.S.C. § 1143a(g), and with Congressional intent. Accordingly, the district court's dismissal of plaintiff's complaint is **AFFIRMED**.

The regulation easily survives rational basis review. It is not arbitrary and capricious in its exclusion of certain religious activities. The exemption serves the legitimate governmental interest of avoiding the mere appearance of excessive governmental entanglement with religion. Thus, the district court's ruling that the regulation does not violate Bowman's equal protection rights hereby is **AFFIRMED**.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LINDEN D. BOWMAN, Plaintiff	)	Case No.: 1:06 CV 1323
	)	JUDGE SOLOMON OLIVER, JR.
v.	)	
UNITED STATES OF AMERICA, *et al.*	)	
Defendants	)	ORDER

Pending before the court is Defendants United States of America, *et al.* (collectively, "Defendants") Motion to Dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6). (ECF No. 12.) For the foregoing reasons, the Fed.R.Civ.P. 12(b)(1) motion to dismiss is denied, and the Fed.R.Civ.P. 12(b)(6) motion is granted.

I. FACTS AND PROCEDURAL HISTORY

On October 23, 1992, Congress passed Pub.L. 102-484, codified in 10 U.S.C. § 1143a, directing the Secretary of Defense to "implement a program to encourage members and former members of the armed forces to enter into public and community service jobs after discharge or release from active duty." 10 U.S.C. § 1143a(a). Pursuant to this authority, the Secretary of Defense promulgated 32 C.F.R. §§ 77.1-.6, the Program to Encourage Public and Community Service ("Program"). Section

77.4(b)(2) permits qualified former military personnel to accrue additional service credit for retirement through employment with "public or community service organization[s] that provide the services listed in sections 77.3(d)(1) through (d)(12)."[1] The Program, however, excludes "organizations engaged in religious activities, unless such activities are

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[1]32 C.F.R. § 77.3(d), (e) defines a "public and community service organization" as follows:

> Government or private organizations that provide or coordinate the provision of the following services:
> (1) Elementary, secondary, or post secondary school teaching or administration.
> (2) Support of teachers or school administrators.
> (3) Law enforcement.
> (4) Public health care.
> (5) Social services.
> (6) Public safety.
> (7) Emergency relief.
> (8) Public housing.
> (9) Conservation.
> (10) Environment.
> (11) Job training.
> (12) Other public and community service not listed previously, but consistent with or related to services described in paragraphs (d)(1) through (11) of this section.
>
> (e) Public service employment. Work in a Federal, state or local government organization which provides or coordinates services listed in paragraphs (d)(1) through (12) of this section.

unrelated to religious instructions, worship services, or any form of proselytization." 32 C.F.R. § 77.3(a). It also excludes "businesses organized for profit, labor unions, [and] partisan political organizations." *Id.*

Plaintiff served in the United States Air Force from September, 1977, until he retired in January, 1996. (Am. Compl. ¶ 18, 20, ECF No. 21.) Plaintiff maintains that he retired with approximately seventeen years and three months of service. (*Id.* ¶ 20.) Plaintiff further states that he began employment with the People's Church of the C & MA ("Church") in Geneva, Ohio in January, 1996, as a lay intern and later as a youth minister and that he was continuously employed with the Church until February, 2001. (*Id.* ¶ 21-22.)

Plaintiff filed this lawsuit on May 30, 2006. (Comp., ECF No. 1.) In his Amended Complaint,[2]

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[2] On December 27, 2007, Plaintiff filed a Motion to Amend the Complaint (ECF No. 15), together with a proposed First Amended Complaint. (ECF No. 15-1.) In Plaintiff's Motion to Amend, he sought to add the following paragraph:

> Late in the year 1998, the Plaintiff prepared and submitted to the Director, Defense Manpower Data Center ..., in Fort Ord, California a Validation of Public or Community Service Employment form requesting his employment with the People's C & MA Church starting January 1, 1996, be credited toward his years of service with the military under the

Plaintiff alleges that he filed for military service credit under the Program "late in the year 1998," again in November 2002, and once more in October, 2004, by submitting a Validation of Public or Community Service Employment Form ("Validation Form") to the Defense Manpower Data Center ("DMDC"). (Am.Comp.¶¶ 24-26.)

Plaintiff alleges that "the reason his request for creditable service under the [Program] has not been granted and/or processed is because the form shows on its face that the Plaintiff's employment was with a religious organization and so the employment does not qualify under [32 C.F.R. § 77.3(a)]." (Am.Comp.¶ 27.) Plaintiff also cursorily alleges that he "engaged in public and community service of the kind described in 10 U.S.C. § 1143a(g) and 32 C.F.R. § 77.3(d)." (Am.Compl.¶ 23.) Plaintiff, however, acknowledges that "because of the provisions of 32 C.F.R. § 77.3(a) providing that nonprofit organizations 'engaged in religious activities' may not be considered a qualifying organization under the [Program], any application ... for creditable service based upon his employment by [the Church] between

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> Community Service Program. The Plaintiff never received any response to this 1998 application for service credits under the Community Service Program.

(Mot. to Amend at 1.) The court granted Plaintiff's Motion to Amend on July 20, 2007. (*See* Order, ECF No. 20.) Plaintiff filed the Amended Complaint on July 2, 2007. (Am. Comp., ECF No. 21).

from [sic] January 1, 1996 and February 28, 2001 would be denied because the activities of the church were related to religious instruction and worship services." (Am.Comp.¶¶ 28.)

Plaintiff states that the exclusion contained in 32 C.F.R. § 77.3(a)"is not authorized by 10 U.S.C. § 1143a(g) and is contrary to the purpose and intent of Congress." (*Id.* ¶ 33.) Additionally, Plaintiff alleges that the regulation's provision barring an early retiree from earning credit toward military service if he works for a religious organization and performs activities related to religious instructions, worship services, or proselytization is unconstitutional on its face and as applied to Plaintiff. (*Id.* ¶ 31-32.)

Plaintiff asks that the court declare that the exclusion contained in 32 C.F.R. § 77.3(a) is unconstitutional on its face and as applied to Plaintiff. (*Id.* at 9.) Plaintiff also asks that Defendants be permanently enjoined from enforcing or applying the exclusion contained in 32 C.F.R. § 77.3(a). (*Id.* at 9.) Finally, Plaintiff asks the court to issue a mandatory injunction directing Defendants to amend Plaintiff's records to indicate he performed public and community service creditable toward his military retirement pension and benefits, based on twenty years of service (*Id.* at 9.)

On November 21, 2006, Defendants filed the pending Motion to Dismiss. (ECF No. 12.). In its Motion, Defendants argue: (1) this court lacks subject matter jurisdiction because Plaintiff lacks Article III

and prudential standing; (2) this court lacks subject matter jurisdiction because Plaintiff's as-applied and facial Equal Protection challenges to 32 C.F.R. § 77.3(a) are barred by the statute of limitations; and (3) Plaintiff fails to state a claim upon which relief can be granted because the regulation would violate the Establishment Clause if it did not contain language excluding an early military retiree from earning retirement credit if he works for a religious organization *and* performs activities related to religious instructions, worship services, or any form of proselytization. (Mot. to Dismiss at 7, 8, 11.).

Plaintiff filed an Opposition to Defendants' Motion to Dismiss on December 26, 2006. (Pl.'s Mot. Opp'n, ECF No. 14.). In his Opposition, Plaintiff argues: (1) he has Article III and prudential standing because he timely submitted his application for benefits; (2) his claim is not barred by the statute of limitations because his cause of action never accrued as there was never a final agency action rendered on his application; and (3) the regulation would not violate the Establishment Clause if it allowed an early retiree to earn military retirement credit for working at a religious organization *and* performing religious activities related to religious instructions, worship services, and proselytization. (*Id.* at 4-9.)

II. STANDARD FOR DISMISSAL

A defendant may challenge the court's subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). The plaintiff has the burden of proving the

court's subject matter jurisdiction. *Rogers v. Stratton Indus.*, 798 F.2d 913, 915 (6th Cir.1986). In the context of a Rule 12(b)(1) motion, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson* 355 U.S. 41, 45-46 (1957). Furthermore, a "Rule 12(b)(1) motion to dismiss will be granted only if, taking as true all facts alleged by the plaintiff, the court is without subject matter jurisdiction to hear the claim." *Nawar Omeiri v. Dist. Dir., Bureau of Citizenship and Immigration*, No. 07-11757, 2007 WL 2121998, 2007 U.S. Dist. LEXIS 53235, at *3 (E.D.Mich. July 24, 2007) citing *Hishon*, 467 U.S. at 73).

Under Fed. R. Civ. P. 12(b)(6) the court examines the legal sufficiency of a plaintiff's claim. *See Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir.1993). Courts reviewing a 12(b)(6) motion must accept the well-pled factual allegations of the complaint as true and construe all reasonable inferences in favor of the plaintiff. *See Miller v. Currie*, 50 F.3d 373, 377 (6th Cir.1995). The court, however, need not accept "conclusions of law or unwarranted inferences cast in the form of factual allegations." *Czupih v. Card Pak, Inc.*, 916 F.Supp. 687, 689 (N.D.Ohio 1996). Ultimately, a complaint may be dismissed only if "the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief." *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir.1995).

III. LAW AND ANALYSIS

A. Standing.

In its Motion to Dismiss, Defendants argue that this court lacks subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) because Plaintiff does not have standing to bring this action (Defs.' Mot. to Dismiss at 7.) In order to establish standing, a plaintiff must satisfy both Article III of the U.S. Constitution and prudential standing requirements.

1. Article III Standing.

Standing under Article III requires a plaintiff to demonstrate: "(1) an injury in fact that is actual or threatened; (2) a causal connection between the defendants' conduct and the alleged injury; and (3) a substantial likelihood that the injury will be redressed by a favorable decision." *Huish Detergents Inc. v. Warren County Ky.*, 214 F.3d 707, 710 (6th Cir.2000) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). In his Amended Complaint Plaintiff alleges:

> [b]ut for the provision of 32 C.F.R. § 77.3(a) excluding employment with "organizations engaged in religious activities" from the Community Service Program, the Plaintiff would be entitled to credit toward his military retirement benefits.... [and] Plaintiff would be

> entitled to receive 50% of his base military pay upon reaching the age of 62.

(Am.Comp.¶ 28, 29.). These two paragraphs themselves satisfy Article III as they state: (1) that Plaintiff is injured because he did not receive benefits as a result of the classification drawn in the statute; (2) that Defendants are responsible as the creator of the regulation; and (3) that invalidating the statute would permit Plaintiff to receive benefits. Therefore, taking these allegations as true, Plaintiff satisfies Art. III requirements.

2. Prudential Standing.

Under the Administrative Procedures Act ("APA") "all parties 'adversely affected or aggrieved' by a final agency action [have] prudential standing to bring suit in federal court. 5 U.S.C. § 702. A person is 'adversely affected or aggrieved' within the meaning of the APA if his or her claim meets the 'zone of interest' test." *Bangura v. Hansen,* 434 F.3d 487, 498-99 (6th Cir.2006) (citing *NCUA v. First Nat'l Bank & Trust Co.,* 522 U.S. 479, 487-90 (1998)). Prudential standing merely requires that Plaintiff show that "the interest he or she seeks to protect, 'is *arguably* within the zone of interests to be protected by the statute' under which the plaintiff sues." *Id.* at 499 (quoting *NCUA,* 522 U.S. at 492).

The zone of interest test is a two-part inquiry: "[f]irst, the court must determine what interests the

statute *arguably* was intended to protect, and second, the court must determine whether the 'plaintiff's interests affected by the agency action in question are among them.' " *Id.* (quoting *NCUA*, 522 U.S. at 492). The Sixth Circuit has held that the prudential standing test "is not meant to be especially demanding." *Id.* (quoting *Courtney v. Smith*, 297 F.3d 455, 461 (6th Cir.2002)).

Defendants do not contest the first prong of the prudential standing test. Defendants, however, argue that Plaintiff fails to satisfy the second prong of the prudential standing test because "[n]o final [agency] action was taken because DMDC never received a proper timely application to participate in the [Program] from Plaintiff." (Mot. to Dismiss at 7.) Specifically, Defendants contend that Plaintiff did not complete "all required reporting within 1 year of the end of the enhanced retirement qualification period as required by DODI 1340.19, ¶ 5.3.3." (*Id.*) As a result of Plaintiff's alleged untimely application, Defendants contend that "[n]o final action was taken because DMDC never received a proper, timely application to participate in the [Program] from Plaintiff." (*Id.*).

Where, as here, a party seeks review of agency action, the APA provides that the party must demonstrate they have been " 'adversely affected or aggrieved' by a *final agency action.*" *Bangura*, 434 F.3d at 498-99 (emphasis added). For the purpose of the APA, "adversely affected" and "zone of interest" are equivalent, and "an action is final where it: (1)

marks the 'consummation of the agency's decision-making process;' and (2) determines rights and obligations or occasions legal consequences." *Id.* at 500-01 (quoting *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997)). However, delay or inaction by the agency may also constitute final action permitting an applicant to seek review. *See Natural Res. Def. Council v. Fox,* 93 F.Supp.2d 531, 538 (S.D.N.Y.2000) ("The APA itself includes 'failure to act' in its definition of 'agency action.' ") (citing 5 U.S.C. § 551(3)); *see also*5 U.S.C § 701(b)(2) (" 'agency action' [has] the meaning [ ] given [to it] by section 551 of this title"); *Sierra Club v. Thomas,* 828 F.2d 783, 793 (C.A.D.C.1987) ("Agency inaction may represent effectively final agency action that the agency has not frankly acknowledged"); *Pub. Citizens Health Research Group v. Com'r, FDA,* 740 F.2d 21, 32 (D.C.Cir.1984) ("At some point administrative delay amounts to a refusal to act, with sufficient finality and ripeness to permit judicial review.").

Here, Plaintiff satisfies the second prong of the prudential standing test because he has alleged Defendants' inaction in his Amended Complaint as well as the fact that he was adversely affected or aggrieved by Defendants' inaction.[3] Specifically,

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[3] Plaintiff also argues that DoDI 1340.19 does not have the force of law and consequently has no bearing on whether his application was timely. (Pl.'s Mot. in Opp. at 4.) Finally, Plaintiff argues it is a reasonable inference that the DMDC received his application "especially in light of the common law 'Mailbox Rule' that the proper

Plaintiff states in his Amended Complaint that he filed a Validation Form with DMDC "late in the year 1998." (Am.Comp.¶ 24.) Plaintiff filed the Validation Form again in November, 2002, and October, 2004. (Am.Comp.¶ 25, 26.) Moreover, Plaintiff alleges that he sent a letter with the Validation Form in October, 2004, requesting clarification as to whether his application was denied. (Am.Compl.¶ 26.) Since on a 12(b)(1) motion to dismiss the court must "tak[e] as true all facts alleged by the plaintiff," *Omeiri*, 2007 WL 2121998 at *1, 2007 U.S. Dist. LEXIS 53235, at *3 (citing *Hishon*, 467 U.S. at 73), it finds that Plaintiff has complied with DoDI 1340.19 ¶ 5.3.3 because he submitted the necessary paperwork prior to October 1, 1999, one year after his twenty-year retirement. Plaintiff therefore fulfills the second prong of the prudential standing testing because he alleges in his Amended Complaint that he was

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mailing of a document raises a rebuttable presumption that it is received by the addressee." (*Id.*)

First, this court need not rule on Plaintiff's argument that DoDI do not have the force of law because, in light of the court's Order granting Plaintiff's Motion to Amend Complaint (ECF No. 20), the issue of timeliness is moot. Second, this court need not address Plaintiff's mailbox rule argument because DoDI 1340.19 ¶ 5.3 only requires that Plaintiff "submit" a completed Validation Form; it does not require that DMDC "receive" the Validation Form. Accordingly, Defendant's contention that Plaintiff failed to state a claim by failing to aver that DMDC *received* the Validation Form is unavailing because DoDI 1340.19 ¶ 5.3, which Defendants argues is controlling here, does not require Plaintiff to make such a claim.

adversely affected or aggrieved by Defendants' inaction. Accordingly, Defendants' argument based on Plaintiff's lack of prudential standing is not well-taken.

B. Statute of Limitations.

In its Motion to Dismiss, Defendants argue that the court lacks subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) because Plaintiff has exceeded the statute of limitations. First, Defendants assert that Plaintiff's as-applied Equal Protection claim in regard to 32 C.F.R. § 77.3(a) fails because the claim is time-barred under 28 U.S.C. § 2401(a). Second, Defendants charge that Plaintiff's facial challenge to 32 C.F.R. § 77.3(a) fails because Plaintiff failed to bring suit within six years after the publication of the regulation. For the foregoing reasons, Defendants' arguments are not well-taken.

First, Defendants assert that Plaintiff's as-applied claim is barred by 28 U.S.C. § 2401(a), which states that "[e]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Defendant argues that Plaintiff failed to submit a timely application pursuant to DoDI 1340.19 ¶ 5.3.3, which required Plaintiff to file for military service credit no later than one year after the end of the enhanced retirement qualification period that is synonymous with the twenty year-point. (Defs.' Mot. to Dismiss at 10) (citing DoDI 1340.19 ¶ 5.3.3). Defendants argue that because

Plaintiff's twenty-year point is October 1, 1998, the statute of limitations on his cause of action accrued on October 1, 1999. (Def. Mot. To Dismiss at 10). Defendants therefore assert that the statute of limitations expired on October 1, 2005, and Plaintiff's suit is time-barred because he filed this cause of action on May 30, 2006. (*Id.* at 11.).

Plaintiff contends that the statute of limitations has not yet expired because DMDC never acknowledged his application or rendered a decision on its merits. (Pl.'s Opp'n at 6-7, ECF No. 14.) Plaintiff alleges that a claim "accrues at the time of the final agency decision, or the exhaustion of all administrative remedies." (*Id.* at 6.) Plaintiff concludes that until there is a final agency decision, his cause of action does not accrue, nor does the six-year statute of limitations begin to run. (*Id.*)

As noted previously, Plaintiff has alleged that he properly filed his application within one year of his twenty-year point pursuant to DoDI 1340.19 ¶ 5.3.3. Additionally, the court has determined that eight years of inaction constitutes a final agency action. Although the court will not specify an exact date on which the agency action was final, the court finds that his cause of action accrued at least after the date he submitted his final application in 2004. Therefore, even assuming that Plaintiff's cause of action accrued the day he filed his last application, the six-year statute of limitations would not expire until 2010. Taking Plaintiff's allegations as true, and construing all reasonable inferences in his favor, the

court finds that the statute of limitations on his cause of action has not expired.

Second, citing *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service,* 112 F.3d 1283, 1287 (5th Cir.1997), Defendant argues that Plaintiff's facial Equal Protection challenge is time-barred because Plaintiff failed to file within six years after 32 C.F.R. § 77.3 appeared in the Federal Register. (Defs.' Mot. To Dismiss at 11.) The Defendants claim that "[s]ince 32 C.F.R. § 77.3 appeared in the Federal Register on August 10, 1994[,]" the statute of limitations ran on August 10, 2000. (*Id.*)

In *Dunn-McCampbell,* the plaintiff brought facial and as-applied challenges against the defendants' oil and gas right regulations promulgated in 36 C.F.R. § 9B. The court stated that "[o]n a facial challenge to a regulation, the limitations period begins to run when the agency publishes the regulation in the Federal Register." *Id.* at 1287 (citing *Fed. Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384 (1947)). However, the court noted that "it is possible ... to challenge a regulation after the limitations period has expired, provided that the ground for the challenge is that the issuing agency exceeded its *constitutional or statutory authority.*" *Id.* (emphasis added). Furthermore, the court posited that "an agency's application of a rule to a party creates a new, six-year cause of action to challenge the agency's constitutional or statutory authority." *Id.* The plaintiff in *Dunn-McCampbell,* however, could not prove that there was any application of the

statutes in order to restart the six-year period. *Id.* at 1287-88.

In contrast to *Dunn-McCampbell,* Plaintiff here has alleged that the DMDC applied 32 C.F.R. § 77.3(a) to him by pleading that his application was not considered "because the form shows on its face that Plaintiff's employment was with a[n] [organization engaged in religious activities] and so [it would] not qualify under ...32 C.F.R. § 77.3(a)." (Am.Compl.¶ 27.) Taking Plaintiff's allegations as true and applying the rule set forth in *Dunn-McCampbell,* the court finds that the application of the regulation to Plaintiff restarts the six-year statute of limitations. Consequently, Defendants' argument is not well-taken.

C. Authorization of 32 C.F.R. § 77.3(a).

As a preliminary matter, the court must address Plaintiff's contention that the regulatory exclusion in 32 C.F.R. § 77.3(a) is not authorized by 10 U.S.C. § 1143a and is contrary to the purpose and intent of Congress in establishing the Program. (Pl.'s Opp'n at 13). Defendants argue that the regulatory exclusion is authorized by 10 U.S.C. § 1143a. For the foregoing reasons, Plaintiff's arguments are not well-taken.

10 U.S.C. § 1143a(g) states as follows:

> (g) Definitions. In this section, the term "public service and community service organization" includes the following organizations:
>
> > (1) Any organization that provides the following services:
> >
> > > (A) Elementary, secondary, or postsecondary school teaching or administration.
> > > (B) Support of such teaching or school administration.
> > > (C) Law enforcement.
> > > (D) Public health care.
> > > (E) Social services.
> > > (F) Any other public or community service.
> >
> > (2) Any nonprofit organization that coordinates the provision of services described in paragraph (1).

Defendants acknowledge that the challenged regulation, 32 C.F.R. § 77.3(a), "allows early retirees to participate in the [Program] when they work for nonprofit organizations engaged in religious activities if the activities are unrelated to religious instructions, worship services, or any form of proselytization." (Defs.' Reply at 7.) Accordingly, and contrary to Plaintiff's assertion otherwise, the regulatory exclusion contained in 32 C.FR § 77.3(a) is therefore consistent with the authorization provision of 10 U.S.C. § 1143a(g).

D. Equal Protection.

Defendants contend that Plaintiff fails to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6) because the Program does not violate Plaintiff's Equal Protection rights. Defendants argue that the purpose of the Program is to benefit community and public service organizations and, as such, religious activities are excluded. Defendants also argue that, if the government provided funding for early retirees to participate in religious activities such as religious instructions, worship services, and proselytization to religious organizations, the regulation would violate the Establishment Clause. (Defs.' Mot. to Dismiss at 11-18.) Defendants argue that rational basis is the appropriate level of scrutiny. (Defs.' Reply at 6.) Plaintiff, however, responds that 32 C.F.R. § 77.3(a) violates his Equal Protection rights, as applied and facially,[4] because the Establishment Clause would not be violated if the exclusion were not present, and that strict scrutiny is the appropriate level of scrutiny. Plaintiff confines his challenge to the constitutionality of the regulation and does not argue that his activities as a youth minister qualify him for military retirement credit under the existing

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[4] Beyond alleging that he has performed public and community services (Am. Comp. ¶ 23, Pl.'s Opp'n at 11-12), Plaintiff has not set forth any facts to call into question the application of the statute to him. Therefore, the court finds that there is no difference in this case between Plaintiff's as-applied and facial Equal Protection claims.

regulation. (Am.Comp.¶ 28.) For the foregoing reasons, Plaintiff's arguments are not well-taken.

1. Applicable Level of Scrutiny.

The Establishment Clause of the First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion." The Equal Protection Clause of the Fourteenth Amendment forbids any state from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV. Equal protection applies to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe,* 347 U.S. 497, 500 (1954). It is well-settled that the requirements of Equal Protection are the same whether the challenge is to the federal government under the Fifth Amendment or to state and local actions under the Fourteenth Amendment. *Buckley v. Valeo,* 424 U.S. 1, 93 (1976).

The Equal Protection Clause "protects against arbitrary classifications, and requires that similarly situated persons be treated equally." *Jackson v. Jamrog,* 411 F.3d 615, 618 (6th Cir.2005). If the government action does not implicate either a fundamental right or single out suspect classifications, statutes "must bear only a rational relationship to a legitimate state interest." *Id.* (citing *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985)). Therefore, strict scrutiny applies in Equal Protection cases when a plaintiff's

fundamental right to the free exercise of religion is implicated. *Locke v. Davey,* 540 U.S. 712, 720 n. 3, (2004) (applying rational basis scrutiny to the plaintiff's Equal Protection claim because the plaintiff's free exercise rights were not violated and holding that the Washington state program excluding students from pursuing theology degrees with state scholarship funds passes such rational basis review); *Teen Ranch v. Udow,* 389 F.Supp.2d 827, 841 (W.D.Mich.2005), *aff'd* 479 F.3d 403 (6th Cir.2007) (determining that since the plaintiff, who claimed the provision in the state appropriations bill excluding funding to sectarian programs violated her Equal Protection rights, "do not have a meritorious Free Speech or Free Exercise claim, their Equal Protection claim is subject to rational basis scrutiny."); *Wirzburger v. Galvin,* 412 F.3d 271, 283 (1st Cir.2005) (citing *Locke* and applying rational basis scrutiny to the plaintiff parents' claims that the Massachusetts Const. amend. art. 18, which prohibited public financial support for private schools, violated their Equal Protection rights). Strict scrutiny also applies in Establishment Clause cases when a state disfavors religion on its face or has been motivated by animosity against religion. *Locke,* 540 U.S. at 725 n. 10, citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 532 (1993) (applying strict scrutiny and holding that the statute prohibiting animal sacrifice was motivated by religious animus toward a particular religious sect).

Here, strict scrutiny is inappropriate because Plaintiff does not allege that 32 C.F.R. § 77.3(a)

interfered with his fundamental right to freely exercise his religion or that the statute was motivated by animosity against religion or disfavors religion. First, Plaintiff does not contend that 32 C.F.R. § 77.3(a) interferes with his fundamental right to freely exercise his religion. Plaintiff does not contend that 32 C.F.R. § 77.3(a) imposes criminal or civil sanctions on any type of religious service or right in which Plaintiff participated. *See Locke,* 540 U.S. at 720 (citing *Hialeah,* 508 U.S. at 532). Plaintiff does not maintain that 32 C.F.R. § 77.3(a) denies Plaintiff the right to participate in the political affairs of the community. *Locke,* 540 U.S. at 720, 124 S.Ct. 1307. (citing *McDaniel v. Paty,* 435 U.S. 618 (1978)). Plaintiff does not argue that 32 C.F.R. § 77.3(a) requires Plaintiff to choose between his religious beliefs and receiving a religious benefit. *Locke,* 540 U.S. at 720-21 (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. Of Indian Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner,* 374 U.S. 398 (1963)). Plaintiff therefore has not alleged facts that his fundamental right to exercise his religion has been curtailed by 32 C.F.R. § 77.3(a).

Additionally, the regulation does not disfavor religion or display animus toward religion. Like the State of Washington in *Locke* that chose not to allow students to use state scholarship funding to obtain a theology degree, Defendants here have also "merely chosen not to fund a distinct category," *Locke,* 540 U.S. at 720, of Program recipients. As the court in

Locke concluded, such a statutory exclusion does not disfavor religion. Notably, the regulation here excludes a number of different types of organizations. 32 C.F.R. § 77.3(a) ("These programs shall not be administered by businesses organized for profit, labor unions, partisan political organizations, or organizations engaged in religious activities ..."). Yet far from disfavoring or evincing hostility to religion, Defendants acknowledge that the Program credits military personnel for their work at religious organizations, so long as the activities performed by the early retiree "are unrelated to religious instructions, worship services, or any form of proselytization." (Defs.' Reply at 7) (quoting 32 C.F.R. § 77.3(a)). Significantly, the regulation does not make *any* such accomodations for businesses organized for profit, labor unions, or partisan political activities. Consequently, Plaintiff has failed to allege that 32 C.F.R. § 77.3(a) disfavors or shows animus toward religion. Accordingly, rational basis scrutiny is appropriate here because 32 C.F.R. § 77.3(a) does not interfere with Plaintiff's fundamental right to freely exercise his religion, the statute was not motivated by animosity against religion, and it does not disfavor religion.

To satisfy rational basis scrutiny, the burden of proof is on Plaintiff to show that 32 C.F.R. § 77.3(a) does not bear "a rational relationship to a legitimate state interest." *Jackson v. Jamrog*, 411 F.3d 615, 618 (6th Cir.2005) (citing *Cleburne Living Ctr.*, 473 U.S. at 440). Significantly, the "rational basis test is enormously deferential to the

government, and only rarely have laws been declared unconstitutional for failing to meet this level of review." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.1 (2002) (citations omitted). Under rational basis scrutiny, "statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify its discrimination." *McGowan v. Maryland,* 366 U.S. 420, 426 (1961).

2. Applying Rational Basis Scrutiny.

Defendants claim two purposes for the classification in 32 CFR § 77.3(a) excluding an early retiree from working at a religious organization and performing religious instructions, worship services, and proselytization, and Defendants argue both purposes withstand rational basis scrutiny. First, Defendants argue that the Program's classification excluding religious activities is rationally related to its purpose of providing benefits only to community and public service organizations. Second, Defendants argue that the Program's classification excluding religious activities is also rationally related to Defendants' purpose of avoiding an Establishment Clause violation. For the foregoing reasons, the court concludes that the Program withstands rational basis scrutiny.

a. Providing Benefits to Community and Public Service Organizations.

Defendants note that "the purpose of the [Program] is to utilize the experience and skills of those individuals in the 15 to 20-year category 'to fill critical needs in our communities' such as 'in education, law enforcement, and health care that are underserved.' " (Defs.' Reply at 8) (citing Senate Committee on Armed Services, 102 S. REP. NO. 92-352). The plain meaning of 32 C.F.R. § 77.1(b) also confirms Defendants' assertion that the primary purpose of the Program is to benefit public and community organizations, not, as Plaintiff asserts, military retirees. (The "purpose" of the Program is to "[e]ncourage and assist Service members requesting retirement with fewer than 20 years of service *to register for public and community service employment.") (Id.*) (emphasis added).

Since funding religious activities is not a purpose of the Program, Defendants argue, the classification excluding such activities is a rational means to serve the legitimate interest of filling critical needs in public and community service organizations. (*Id.* at 8-9). Moreover, the Equal Protection Clause does not require Defendants to fund religious organizations in the same way that it funds secular organizations in any given program. *Teen Ranch,* 389 F.Supp.2d at 838 (*Locke v. "Davey* confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity.") (quoting

Eulitt v. Maine, Dept. of Educ., 386 F.3d 344, 354 (1st Cir.2004)). Defendants' argument is well-taken. Since Plaintiff has not shown that Defendant fails to set forth any set of facts that could reasonably justify the religious exclusion in 32 CFR § 77.3(a) based on the Program's purpose of only benefitting community and public service organizations, the statute withstands rational basis scrutiny.

b. Avoiding Establishment Clause Violation.

Second, Defendants argue that the purpose of the classification in 32 C.F.R. § 77.3 excluding religious organizations that are engaged in religious activities is Defendants' desire to avoid a violation of the Establishment Clause. The Supreme Court adopted a three-pronged test in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), to determine whether a government statute or practice complies with the Establishment Clause. First, the statute must have a secular legislative purpose. *Id.* Second, the statute's principal or primary effect must neither advance nor inhibit religion. *Id.* Third, the statute must not foster an excessive entanglement with religion. *Id.* The "entanglement" prong has been folded into the "effect" prong. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) ("The Establishment Clause ... prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion.").

Here, Defendants do not dispute that the Program complies with the first prong of the *Lemon*

test. As discussed above, Defendants acknowledge that the Program has the secular purpose of encouraging military service personnel to fill critical needs in community and public service organizations by offering retirement credit to military personnel. (Defs.' Reply at 8, ECF No. 17). Such a purpose is clearly secular under the first prong of the *Lemon* test.

Defendants argue, however, that were this federal program to provide increased retirement pay benefits for Plaintiff to work at a religious organization and perform religious services such as religious instructions, worship services, or proselytization, the statute would fail the second prong of the revised *Lemon* test. (Mot. to Dismiss at 18.) Defendants argue that doing so would have the principal or primary effect of advancing religion because it would be funding "specifically religious activities" at a "pervasively sectarian" organization in violation of Establishment Clause precedent. *See Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 407-09 (6th Cir.2002) (stating that the *Roemer v. Bd. of Publ. Works of Maryland,* 426 U.S. 736, 755 (1976) rule that "no state aid at all shall go to institutions that are so 'pervasively secular' that secular activities cannot be separated from sectarian ones" is controlling until the Supreme Court specifically overrules it). Defendants also argue that the Program would "result in an excessive government entanglement with religion as the government would have to monitor Plaintiff's sectarian work at the

church to determine whether it constituted public or community service." (Defs.' Mot. to Dismiss at 18).

Defendants argue that the classification in 32 C.F.R. § 77.3(a) limiting the Program to religious organizations that are not engaged in religious activities such as religious instructions, worship services, and proselytization allows the government to avoid violating the "effect" prong of the revised *Lemon* test, and that this exclusion is permissible under federal law. Defendants note that the restriction against funding activities related to religious instructions, worship services, or any form of proselytization in 32 C.F.R. § 77.3(a) is consistent with "charitable choice" provisions that have been applied to a range of government grant programs in recent years to prohibit government funds from being used for sectarian purposes. (Defs.' Mot. to Dismiss at 15-17) (citing 42 U.S.C. § 300x-65(i); 29 U.S.C. § 2938(a)(3); 42 U.S.C. § 9920(c)). Moreover, Defendants correctly points out that the Supreme Court upheld the general grant program in *Roemer,* 426 U.S. at 740-41, which prohibited grantee private colleges from using such money for "sectarian purposes," and the school aid program in *Mitchell,* 530 U.S. at 831, which prohibited any aid for any activity that was not "secular, neutral, and nonideological." (Mot. to Dismiss at 17).

The Supreme Court in *Locke,* 540 U.S. at 720 n. 3, applied rational basis scrutiny to a state statute excluding state funding of sectarian schools and held the exclusion did not violate students' Equal

Protection rights. Applying federal precedent in the wake of *Locke,* the Supreme Court of Maine interpreted federal Establishment Clause precedent and applied rational basis scrutiny to hold that Me.Rev.Stat. Ann. Tit. 20-A, § 2951(2), which excluded sectarian schools from payment of public funds for tuition at certain private schools, did not violate parents' Equal Protection rights. The court's rationale was based on the fact that the state's desire to avoid excessive entanglements between government and religion provided a rational basis to maintain the funding limitation. *Anderson,* 2006 Me. LEXIS 39 at * 56. The Sixth Circuit has held that the "desire to avoid violating the Establishment Clause ... is sufficient to meet the rational basis test." *Teen Ranch,* 479 F.3d at 410 (quoting the district court's holding, 389 F.Supp. at 841). Defendants here have asserted that the same desire to avoid an Establishment Clause violation was a purpose of the classification excluding religion in 32 C.F.R. § 77.3(a) Accordingly, Defendants have alleged facts that could reasonably justify the classification in 32 C.F.R. § 77.3(a) excluding religious organizations from the Program.

Plaintiff analogizes the Program here to the indirect funding program at issue in *Zelman,* 536 U.S. 639, which held that students may use government aid at a sectarian school for the secular purpose of education without violating the Establishment Clause. Plaintiff argues that the Program, like the one in *Zelman,* is a "private choice program" that benefits military retirees, who can

direct the aid to organizations of their choice. (Pl.'s Opp'n. at 9-10). However, Plaintiff's reliance on *Zelman* is inapposite because the intended beneficiaries of the *Zelman* private choice program were students, while the intended beneficiaries of the Program here are public and community service organizations, not retirees. Also, the funding in *Zelman* was intended to further the secular purpose of educating schoolchildren. Here, were the regulation not drafted the way it is, funding would go directly to early military retirees who perform religious instructions, worship services, or proselytization. Indeed, 32 C.F.R. § 77.3(a) is carefully crafted to allow an early retiree to earn military credit for his work at a religious organization, so long as the services provided by the early retiree are unrelated to religious instructions, worship services, or proselytization. Significantly, the Sixth Circuit recently upheld a state's right to exclude nonprofit organizations that "integrate religion as an integral part" of the social services the organization provides from receiving state funding, *Teen Ranch,* 479 F.3d at 410, due to the state's "desire to avoid violating the Establishment Clause." *Id.*

Accordingly, 32 C.F.R. § 77.3(a) withstands rational basis scrutiny because Plaintiff has not shown that Defendants failed to set forth any set of facts that could reasonably justify the classification excluding religious organizations. Having determined that 32 C.F.R. § 77.3(a) does not violate the Equal Protection Clause, Plaintiff therefore has failed to

state a claim upon which the court can grant relief. Plaintiff has confined his cause of action to challenging the constitutionality of 32 C.F.R. § 77.3(a). Plaintiff has not, however, alleged that he is entitled to relief under 32 C.F.R. § 77.3(a), *e.g.*, by claiming that, though he worked for a religious organization, the services he provided as a lay intern and youth minister were unrelated to religious instructions, worship services, or any form of proselytization. Rather, Plaintiff indicates in his Amended Complaint that such services were related to religious instructions or worship services, stating that "any application by the Plaintiff for creditable service based upon his employment by the [Church] between from [sic] January 1, 1996 and February 28, 2001, would be denied...." (Am.Compl.¶ 28-29). Accordingly, his challenge to the constitutionality of the regulation on the basis that it violates his rights under the Equal Protection Clause because he is not allowed to receive military service credit for providing community and public services when they are related to religious instructions, worship services, or forms of proselytization is denied. Therefore, the court hereby grants Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted.

IV. CONCLUSION

For the reasons stated above, the court denies Defendants' Motion to Dismiss for lack of subject matter jurisdiction pursuant to Fed. R. 12(b)(1). (ECF No. 12.) The court grants Defendants' Motion to

Dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. 12(b)(6). (ECF No. 12.)

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

August 29, 2007

Pub. L. 102-484, § 4462(a)(1),
Codified at 10 U.S.C. § 1143a

(a) In general.--The Secretary of Defense shall implement a program to encourage members and former members of the armed forces to enter into public and community service jobs after discharge or release from active duty.

(b) Personnel registry.--The Secretary shall maintain a registry of members and former members of the armed forces discharged or released from active duty who request registration for assistance in pursuing public and community service job opportunities. The registry shall include information on the particular job skills, qualifications, and experience of the registered personnel.

(c) Registry of public service and community service organizations.--The Secretary shall also maintain a registry of public service and community service organizations. The registry shall contain information regarding each organization, including its location, its size, the types of public and community service positions in the organization, points of contact, procedures for applying for such positions, and a description of each such position that is likely to be available. Any such organization may request registration under this subsection and, subject to guidelines prescribed by the Secretary, be registered.

(d) Assistance to be provided.--(1) The Secretary

shall actively attempt to match personnel registered under subsection (b) with public and community service job opportunities and to facilitate job-seeking contacts between such personnel and the employers offering the jobs.

(2) The Secretary shall offer personnel registered under subsection (b) counselling services regarding—

(A) public service and community service organizations; and

(B) procedures and techniques for qualifying for and applying for jobs in such organizations.

(3) The Secretary may provide personnel registered under subsection (b) with access to the interstate job bank program of the United States Employment Service if the Secretary determines that such program meets the needs of separating members of the armed forces for job placement.

(e) Consultation requirement.--In carrying out this section, the Secretary shall consult closely with the Secretary of Labor, the Secretary of Veterans Affairs, the Secretary of Education, the Director of the Office of Personnel Management, appropriate representatives of State and local governments, and appropriate representatives of businesses and nonprofit organizations in the private sector.

(f) Delegation.--The Secretary, with the concurrence of the Secretary of Labor, may designate the Secretary of Labor as the executive agent of the

Secretary of Defense for carrying out all or part of the responsibilities provided in this section. Such a designation does not relieve the Secretary of Defense from the responsibility for the implementation of the provisions of this section.

(g) Definitions.--In this section, the term "public service and community service organization" includes the following organizations:

(1) Any organization that provides the following services:

(A) Elementary, secondary, or postsecondary school teaching or administration.

(B) Support of such teaching or school administration.

(C) Law enforcement.

(D) Public health care.

(E) Social services.

(F) Any other public or community service.

(2) Any nonprofit organization that coordinates the provision of services described in paragraph (1).

(h) Coast Guard.--This section shall apply to the Coast Guard in the same manner and to the same extent as it applies to the Department of Defense. The Secretary of Homeland Security shall implement the requirements of this section for the Coast Guard.

Pub. L. 102-484, § 4464

SEC. 4464. INCREASED EARLY RETIREMENT RETIRED PAY FOR PUBLIC OR COMMUNITY SERVICE.

(a) RECOMPUTATION OF RETIRED PAY.--(1) If a member or former member of the Armed Forces retired under section 4403(a) or any other provision of law authorizing retirement from the Armed Forces (other than for disability) before the completion of at least 20 years of active duty service (as computed under the applicable provision of law) is employed by a public service or community service organization listed on the registry maintained under section 1143a(c) of title 10, United States Code (as added by section 4462(a)), within the period of the member's enhanced retirement qualification period, the member's or former member's retired or retainer pay shall be recomputed effective on the first day of the first month beginning after the date on which the member or former member attains 62 years of age.

(2) For purposes of recomputing a member's or former member's retired pay--
(A) the years of the member's or former member's employment by a public service or community service organization referred to in paragraph (1) during the member's or former member's enhanced retirement qualification period shall be treated as years of active duty service in the Armed Forces; and
(B) in applying section 1401a of title 10, United States Code, the member's or former member's years

of active duty service shall be deemed as of the date of retirement to have included the years of employment referred to in subparagraph (A).

(3) Section 1405(b) of title 10, United States Code, shall apply in determining years of service under this subsection.

(4) In this subsection, the term "enhanced retirement qualification period", with respect to a member or former member retired under a provision of law referred to in paragraph (1), means the period beginning on the date of the retirement of the member or former member and ending the number of years (including any fraction of a year) after that date which when added to the number of years (including any fraction of a year) of service credited for purposes of computing the retired pay of the member or former member upon retirement equals 20 years.

(b) SBP ANNUITIES.--(1) Effective on the first day of the first month after a member or former member of the Armed Forces retired under a provision of law referred to in subsection (a)(1) attains 62 years of age or, in the event of death before attaining that age, would have attained that age, the base amount applicable under section 1447(2) of title 10, United States Code, to any Survivor Benefit Plan annuity provided by that member or former member shall be recomputed. For the recomputation the total years (including any fraction of a year) of the member's or former member's active service shall be treated as

having included the member's or former member's years (including any fraction of a year) of employment referred to in subsection (a)(1) as of the date when the member or former member became eligible for retired pay under this section.

(2) In this subsection, the term "Survivor Benefit Plan" means the plan established under subchapter II of chapter 73 of title 10, United States Code.

Code of Federal Regulations,
Title 32, §§ 77.1-77.6
Program to Encourage
Public and Community Service

§ 77.1 Purpose.

This part implements Pub.L. 102-484, Section 4462 and Pub.L. 103-160, Section 561 by establishing policy, assigning responsibilities, and prescribing procedures to:

(a) Encourage and assist separating Service members, Service members retiring with 20 or more years of service, DoD civilian personnel leaving the Government, and spouses to enter public and community service employment.

(b) Encourage and assist Service members requesting retirement with fewer than 20 years of service to register for public and community service employment.

§ 77.2 Applicability and scope.

This part applies to:

(a) The Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Unified Combatant Commands, and the Defense Agencies (hereafter referred to

collectively as "the DoD Components"). The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

(b) All active duty Service members and former members under Pub.L. 102-484, Section 4462 and Pub.L. 103-160, Section 561, and DoD civilian personnel leaving the Government, and their spouses.

§ 77.3 Definitions.

(a) Community service employment. Work in nonprofit organizations that provide or coordinate services listed in paragraphs (d) (1) through (12) of this section. "Nonprofit" is defined as having been recognized by the Internal Revenue Service as having a tax-exempt status under 26 U.S.C. 501 (c)(3) or (c)(4). These organizations shall not be administered by businesses organized for profit, labor unions, partisan political organizations, or organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization.

(b) Creditable early retirement public or community service employment for service members. Employment in a DoD-registered public and community service organization that provides the services listed in paragraphs (d) (1) through (12) of this section, or that coordinates the provision of the

services listed in paragraphs (d) (1) through (12) of this section. Federal employment shall count toward recomputed military retirement pay and Survivor Benefit Plan base amount for early retirees: however, working in a DoD-registered Federal public service organization may trigger the dual-compensation restrictions of 5 U.S.C. 5532. Employment must have occurred between that date of early retirement and the date in which the Service member would have attained 20 years of credible service for computing retired pay, or he or she must have retired on or after October 23, 1992 and before October 1, 1999.

(c) Early retirement. Retirement from active duty with at least 15 but fewer than 20 years of service, as provided by Pub.L. 102-484, Section 4403.

(d) Public and community service organization. Government or private organizations that provide or coordinate the provision of the following services.
(1) Elementary, secondary, or post secondary school teaching or administration.
(2) Support of teachers or school administrators.
(3) Law enforcement.
(4) Public health care.
(5) Social services.
(6) Public safety.
(7) Emergency relief.
(8) Public housing.
(9) Conservation.
(10) Environment.
(11) Job training.

(12) Other public and community service not listed previously, but consistent with or related to services described in paragraphs(d)(1) through (11) of this section.

(e) Public service employment. Work in a Federal, state or local government organization which provides or coordinates services listed in paragraphs (d)(1) through (12) of this section.

(f) Separation. Normal separation from activity duty or civil service, military retirement with 20 or more year's service, release from active military service, and reduction in force.

(g) Transition assistance program counselor. A person charged with the responsibility of conducting transition programs. Examples include personnel assigned to family centers, military or civilian personnel offices, unit transition counselors, and as command career counselors.

§ 77.4 Policy.

It is DoD policy that:

(a) All separating Service members and former members shall be encouraged to enter public or community service employment.

(b) Service members determined to be eligible by the Secretary of their Military Department for, and who

do request retirement with fewer than 20 years of service, are required by Pub.L. 102-484, Section 4403 to register for public and community service employment.
(1) This registration normally shall take place not earlier than 90 days before retirement or terminal/transition leave.
(2) In order to have their military retired pay and Survivor Benefit Plan base amount (if applicable) recomputed in accordance with DoD Instruction 1340.19 [FN1] early retirees must be employed with a DoD-registered public or community service organization that provides the services listed in sections 77.3(d)(1) through (d)(12), or that coordinates the provision of services listed in section 77.3(d)(1) through (d)(12).
[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.
(c) DoD civilian personnel leaving the Government, their spouses, and spouses of Service members who are seeking employment shall be encouraged to register for public and community service employment.

§ 77.5 Responsibilities.

(a) The Under Secretary of Defense for Personnel and Readiness shall:
(1) Monitor compliance with this rule.
(2) Establish policy and provide guidance related to public and community service employment.

(3) Provide program information to the public on the Department of Defense's public and community service employment program.
(4) Ensure that the Director, Defense Manpower Data Center (DMDC):
(i) Maintains the Public and Community Service Organizational Registry.
(ii) Maintains the Public and Community Service Personnel Registry.
(5) Decide the status of requests for reconsideration from employers resubmitting their request to be included on the Public and Community Service Organizational Registry, but whose first request was disapproved.
(b) The Secretaries of the Military Departments shall:
(1) Ensure compliance with this rule.
(2) Encourage public and community service employment for separating Service members, their spouses, DoD civilian personnel leaving the Government, and their spouses.
(3) Coordinate with the Under Secretary of Defense for Personnel and Readiness before promulgating public and community service employment policies and regulations.

§ 77.6 Procedures.

(a) Military personnel offices shall advise Service members desiring to apply for early retirement that they shall register, normally, within 90 days of their retirement date, for public and community service (PACS) employment, and refer them to a Transition

Assistance Program Counselor for registration.

(b) Personnel offices shall advise separating Service members, DoD civilian personnel leaving the Government, and their spouses to contact a Transition Assistance Program Counselor about PACS employment and registration.

(c) Transition Assistance Program Counselors shall counsel separating Service members (during preseparation counseling established by DoD Instruction 1332.36 [FN2]), DoD civilian personnel leaving the Government, and their spouses on PACS employment. Counselors shall update into the Defense Outplacement Referral System (DORS) database Service members requesting early retirement and other DoD personnel or spouses who request registration. Transition Assistance Program Counselors shall use DD Form 2580 (Appendix A to this part) to register personnel for PACS employment. In addition, Counselors shall ensure that Service members who are requesting early retirement are advised that:

[2] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

(1) Registering for PACS employment is a requirement for consummation of their early retirement under Pub.L. 102-484, Section 4403 or Pub.L. 103-160, Section 561.

(2) Early retirees must provide a copy of their confirmation DORS mini-resume to their servicing

military personnel office for filing in their Service record before their final retirement processing.
(3) Subsequent PACS employment is encouraged but not required.
(4) Working in a DoD-approved Federal public service organization may subject him or her to dual compensation restrictions of 5 U.S.C. 5532.
(5) DoD-approved PACS employment qualifies the Service member who is retired under Pub.L. 102-484, Section 4403 or Pub.L. 103-160, Section 561 for increased retired pay effective on the first day of the first month beginning after the date on which the member or former member attains 62 years of age. The former Service member must have worked in DoD-approved PACS employment between the date of early retirement and the date in which he or she would have attained 20 years of creditable service for computing retired pay, and have retired on or after October 23, 1992 and before October 1, 1999.
(6) It is the early retiree's responsibility to ensure that the DMDC is advised when the early retiree's PACS employment starts, and of any subsequent changes.
(d) Military personnel offices shall ensure a copy of the confirmation DORS mini-resume is filed in the permanent document section of the Service record of Service members who retire early.

(e) DMDC shall maintain the PACS Personnel Registry, which includes information on the particular job skills, qualifications, and experience of registered personnel.

(f) DMDC shall maintain the PACS Organizational Registry, which includes information regarding each organization, including its location, size, types of public or community service positions in the organization, points of contact, procedures for applying for such positions, and a description of each position that is likely to be available.

(g) PACS Organizations shall use DD Form 2581 (Appendix B to this part) and DD Form 2581-1 (Appendix C to this part) to request registration on the PACS Organizational Registry. Instructions on how to complete the forms and where to send them are on the forms.

(h) DMDC shall register those organizations meeting the definition of a PACS organization and include them on the PACS Organizational Registry. For organizations that do not appear to meet the criteria, DMDC shall refer the request to the Transition Support and Services Directorate, Office of the Assistant Secretary of Defense for Personnel and Readiness. The Transition Support and Services Directorate may consult individually on an ad hoc basis with appropriate agencies to determine whether or not the organization meets the validation criteria. For organizations which are denied approval as a creditable early retirement organization and which request reconsideration, the Transition Support and Services Directorate will forward that request to the next higher level for a final determination. DMDC shall advise organizations of their status.

No. 08-1184

In the Supreme Court of the United States

LINDEN D. BOWMAN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Congress has directed the Secretary of Defense (Secretary) to "implement a program to encourage members and former members of the armed forces to enter into public and community service jobs after discharge or release from active duty." 10 U.S.C. 1143a(a). The Secretary has promulgated 32 C.F.R. 77.1-.6, which allows service members who retire early to earn service credit toward their retirement pay by working for public service and community service organizations, 32 C.F.R. 77.4(b)(2). The Secretary does not offer credit for work at "organizations * * * administered by businesses organized for profit, labor unions, partisan political organizations, or organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization," 32 C.F.R. 77.3(a).

The question presented is whether the Secretary's decision not to extend credit for employment consisting of religious instructions, worship services, or any form of proselytization is consistent with 10 U.S.C. 1143a and the equal protection component of the Fifth Amendment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 564 F.3d 765. The opinion of the district court (Pet. App. 25a-55a) is reported at 512 F. Supp. 2d 1056.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2008. The petition for a writ of certiorari was filed on March 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has directed the Secretary of Defense (Secretary) to "implement a program to encourage members and former members of the armed forces to enter into public and community service jobs after dis-

charge or release from active duty." National Defense Authorization Act for Fiscal Year 1993 (1993 Act), Pub. L. No. 102-484, sec. 4462(a)(1), § 1143a(a), 106 Stat. 2739. As part of that enactment, service members who retire with fewer than 20 years of active duty can accrue additional service credit for calculation of their retirement pay if they work for a qualifying public or community service organization between the time of retirement and the time they would have attained 20 years of military service. See § 4464(a), 106 Stat. 2741. "[T]he years of the [retiree's] employment by a public service or community service organization * * * [are to be] treated as years of active duty service in the Armed Forces." § 4464(a)(2)(A), 106 Stat. 2741.

The statute defines the term "public service and community service organization" to include (1) "[a]ny organization" that provides "[e]lementary, secondary, or post-secondary school teaching or administration," "[s]upport of such teaching or school administration," "[l]aw enforcement," "[p]ublic health care," "[s]ocial services," or "[a]ny other public or community service," and (2) any nonprofit organization that coordinates the provision of any of those services. 10 U.S.C. 1143a(g).

The statute does not define the phrases "social services" or "other public or community service." The Senate Committee Report on 10 U.S.C. 1143a, however, explains that Congress enacted that statute to help meet "'critical needs in our communities' such as 'in education, law enforcement, and health care that are underserved.'" Pet. App. 48a (quoting S. Rep. No. 352, 102d Cong., 2d Sess. 201, 202 (1992) (*Senate Report*)).

Pursuant to 10 U.S.C. 1143a, the Secretary promulgated 32 C.F.R. 77.1-.6, which created the Program to Encourage Public and Community Service (Program or

PACS). Under the Program, the Secretary maintains two registries. The PACS Personnel Registry "includes information on the particular job skills, qualifications and experience of" retired personnel eligible for the Program. 32 C.F.R. 77.6(e). The PACS Organizational Registry "includes information" on organizations eligible for the Program. 32 C.F.R. 77.6(f). The Program requires early retirees—those service members who retire with more than 15 years but fewer than 20 years of active service, 32 C.F.R. 77.3(c)—to register for PACS. Post-retirement employment with a PACS-eligible organization "is encouraged *but not required.*" 32 C.F.R. 77.6(c)(3) (emphasis added).

Those early retirees who do work for a PACS-eligible "public and community service organization" accrue additional service credit for purposes of their retirement pay. See 32 C.F.R. 77.3(b) and (c), 77.4(b)(2). The Program defines "[p]ublic and community service organization" as any government or private organization providing services related to (1) elementary, secondary, or post secondary school teaching or administration, (2) support of teachers or school administrators, (3) law enforcement, (4) public health care, (5) social services, (6) public safety, (7) emergency relief, (8) public housing, (9) conservation, (10) the environment, (11) job training, or (12) "[o]ther public and community service not listed previously, but consistent with or related to services described [above]." 32 C.F.R. 77.3(d). The Program, however, does not offer retirement credit for work at the following organizations: "businesses organized for profit, labor unions, partisan political organizations, or organizations engaged in religious activities, unless such activities are unrelated to religious instruc-

tions, worship services, or any form of proselytization." 32 C.F.R. 77.3(a).

2. According to his complaint, petitioner served intermittently in the United States Air Force from September 1977 until he retired in January 1996, at which point he had accumulated approximately 17 years and three months of service. Pet. App. 27a. In January 1996, after his retirement from the Air Force, petitioner began employment with the People's Church of the C&MA in Geneva, Ohio (Church) as a lay intern and later as a youth minister. *Ibid.* He was continuously employed with the Church until February 2001. *Ibid.* Although the complaint does not explain petitioner's responsibilities at the Church, petitioner "does not dispute that his duties included religious instructions, worship services, or proselytization." *Id.* at 5a.

The complaint alleges that in 1998, 2002, and 2004, petitioner submitted requests to the Department of Defense (DoD) for service credit under the Program for his work at the Church. Pet. App. 5a. According to the complaint, DoD has not granted or processed those requests because petitioner seeks credit for service with a religious organization. *Id.* at 5a-6a.

3. Petitioner filed suit against the Secretary in the district court for the Northern District of Ohio. He alleged that the Program, by not granting service credit for work at religious institutions, violates both 10 U.S.C. 1143a and the equal protection component of the Fifth Amendment. Pet. App. 1a, 6a.

The Secretary moved to dismiss the complaint because, *inter alia*, it failed to state a claim for which relief could be granted. Pet. App. 29a-30a. The district court granted the Secretary's motion. *Id.* at 40a-54a. The court held that the Program is consistent with 10 U.S.C.

1143a because the Secretary construes the regulations as "allow[ing] early retirees to participate in the [Program] when they work for nonprofit organizations engaged in religious activities if the activities are unrelated to religious instruction[], worship services, or any form of proselytization." *Id.* at 41a (citation omitted; second brackets in original).

The district court also held that the Program does not violate equal protection. The court applied rational basis scrutiny to the Program because it did not interfere with the right to free exercise of religion, was not motivated by animosity toward religion, and did not disfavor religion. See Pet. App. 47a-49a. The court held that the Program serves a rational basis because, *inter alia*, religious activities fall outside the purposes for which Congress authorized the Program—"'to fill critical needs in our communities' such as in 'education, law enforcement, and health care that are underserved.'" *Id.* at 48a (quoting *Senate Report* 201, 202).

4. The court of appeals affirmed. Pet. App. 1a-24a. The court first held that the Program was authorized by 10 U.S.C. 1143a. Pet. App. 7a. Because Congress had not unambiguously defined "public service and community service organization" in Section 1143a(g), it had left "a gap for the Secretary to fill." *Id.* at 11a. The Secretary's decision to "exclude[] from § 1143a(g)'s definition of service all activities involving 'religious instructions, worship or proselytization,'" *id.* at 13a, was a permissible way to fill that gap because nothing in Section 1143a(g)'s text or legislative history "suggest[ed] that Congress intended to encourage retirees to accept positions which would involve" such activities, *ibid.*

The court of appeals then held that the Program was consistent with equal protection. The court determined

that the Program was subject to rational basis scrutiny because it did not discriminate along religious lines or burden petitioner's right to free exercise. Pet. App. 13a-21a. Instead, the Program merely recognized that "religious instructions, worship services, or any form of proselytization," as well as work for "businesses organized for profit, labor unions, and partisan political organizations," fall outside the category of activities for which Congress intended the Program to be available. *Id.* at 19a. The court thus concluded that "the regulation is rationally related to limiting the retirement credit to jobs which fill critical needs in the community, such as in education, law enforcement, and health care." *Id.* at 23a (internal quotation marks omitted).

ARGUMENT

Petitioner asserts that the Program is inconsistent with 10 U.S.C. 1143a and violates equal protection. The court of appeals correctly rejected those claims, and its decision does not conflict with any ruling of this Court or any other court of appeals. And the particular program that is at issue in this lawsuit has now terminated. Further review is therefore unwarranted.

1. The court of appeals correctly concluded that the Secretary's Program is a permissible interpretation of 10 U.S.C. 1143a. Indeed, petitioner does not even assert a conflict in the circuit courts of appeals on this issue (or any other issue in the case).

a. The Secretary has decided not to provide retirement credit for work at "organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization." 32 C.F.R. 77.3(a). That decision is a "reasonable" interpretation of Section 1143a. *Chev-*

ron U.S.A. Inc. v. *NRDC*, 467 U.S. 837, 844 (1984) (*Chevron*).

In Section 1143a, Congress did not indicate whether religious institutions qualify as "public service and community service organization[s]" at which early retirees can earn service credit. 10 U.S.C. 1143a(g). According to that provision, the term "public service and community service organization" includes "[a]ny organization" that offers "teaching or administration," "[l]aw enforcement," "[p]ublic health care," "[s]ocial services," or "[a]ny other public or community service." 10 U.S.C. 1143a(g)(1)(A)-(E). The plain text of the statute does not identify whether religious activities are to be included *or* excluded. Nor is it clear whether the vague terms used in Section 1143a(g)—"social services" and "public or community service"—are meant to cover work at religious institutions.[1] Thus, Section 1143a(g) is "silent or ambiguous" on this issue, *Chevron*, 467 U.S. at 843, and the Secretary's interpretation will be valid unless it is "manifestly contrary to the statute," *id.* at 844.

The Secretary's understanding of Section 1143a(g) is reasonable and therefore permissible. The text of Section 1143a(g) specifically lists "[e]lementary, secondary, or postsecondary school teaching or administration," "[l]aw enforcement," and "[p]ublic health care" as services that are to be covered by the Program. 10 U.S.C. 1143a(g). Because "a word is given more precise content by the neighboring words with which it is associated,"

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[1] Petitioner alleged in his complaint that his "work as a youth pastor constituted 'public and community service' within the meaning of 10 U.S.C. § 1143a(g)." See Pet. 11 n.1. That allegation does not carry weight because "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009).

United States v. *Wilson*, 128 S. Ct. 1830, 1839 (2008), it is reasonable to infer that the general terms "public and community service" and "social services" should be construed in light of the more specific references to education, law enforcement, and public health care. That conclusion is supported by the statute's purpose. As both courts below recognized, Congress enacted 10 U.S.C. 1143a to help meet "'critical needs in our communities' such as 'in education, law enforcement, and health care that are underserved,'" Pet. App. 48a (quoting *Senate Report* 201, 202); see *id.* at 12a.

Consistent with Section 1143a's text and purpose, the Program excludes certain organizations: "businesses organized for profit, labor unions, partisan political organizations, or organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization." 32 C.F.R. 77.3(a). As the court of appeals correctly held, the Program reflects the Secretary's reasonable judgment that these kinds of activities do not closely enough serve the needs that Congress wanted to fill. See Pet. App. 12a-13a. Petitioner points to no case that holds to the contrary, and further review is thus unwarranted.

b. In petitioner's view (Pet. 10-11), because Section 1143a(g) does not explicitly "exclud[e] work for religious organizations and institutions" from the definition of "public service and community service organization[s]," Congress must have intended for such work to be included. That proposition is at odds with basic principles of statutory interpretation. The Court has long acknowledged that drawing an inference from congressional silence is a "hazardous enterprise." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571 (1979). Recently, in *En-*

tergy Corp. v. *Riverkeeper, Inc.*, the Court said that it would "prove[] too much" to conclude that just because a statute "does not expressly authorize" something, the statute "displays an intent to forbid its use." 129 S. Ct. 1498, 1508 (2009). Likewise, it would "prove[] too much" to conclude that just because Section 1143a(g) does not forbid service credit for work at religious institutions, it meant to authorize such credit.

Petitioner also argues (Pet. 11-12) that certain other statutes, which state that religious organizations that wish to participate as providers of secular government services may not use federal money to engage in religious instruction, worship, or proselytization, show that Congress knows how to exclude religious activities. In light of those statutes, petitioner contends, courts should assume that Congress intends such an exclusion only when it expressly provides one. See *ibid.* The statutes upon which petitioner relies, however, are all distinguishable from Section 1143a. See 42 U.S.C. 300x-65(i); 29 U.S.C. 2938(a)(3); 42 U.S.C. 9920(c). Each statute was enacted for the purpose of ensuring that religious institutions are not wrongly excluded from being allowed to participate as providers of secular government services. Since those statutes expressly contemplate that religious institutions will be providing government services, Congress also expressly included prohibitions on the direct use of government funds for inherently religious activity. By contrast, 10 U.S.C. 1143a does not expressly direct or contemplate the inclusion of religious organizations, and it would be improper to draw any inferences from such congressional silence.

c. Petitioner argues (Pet. 13-16) that even if Section 1143a is unclear, the Secretary is not entitled to deference for his interpretation. That contention does not

warrant review because it was not addressed by the lower courts. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, petitioner's arguments lack merit.

First, petitioner contends (Pet. 13) that "[t]he deference required under *Chevron* is inapplicable when the agency action does not involve the exercise of any agency expertise in the implementation of stated Congressional policy." In petitioner's view (Pet. 14-15), because "there is nothing to support the idea that the Secretary or the Department of Defense has any particular expertise in" public or community service, the Secretary is entitled to no interpretive deference. Petitioner's premise is factually and legally unsound.

The subject matter of Section 1143a certainly falls within the Secretary's expertise over matters that are related to military service. Congress enacted that provision to facilitate the downsizing of the armed forces following the collapse of communism in Eastern Europe and the dissolution of the former Soviet Union. See 1993 Act § 4101, 106 Stat. 2658. Providing a retirement credit for service members who would retire early and work in community service jobs was proposed and enacted as a "tool * * * to reduce the 15 to 20-year element of the personnel inventory." *Senate Report* 201. The Secretary's definition of the scope of this retirement credit therefore is directly related to the size of the active-duty force, a matter that involves quintessentially military judgments.

More fundamentally, petitioner is mistaken about the *Chevron* doctrine. *Chevron* "recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it *is entrusted to administer*." 467 U.S. at 844 (emphasis added); see

National Cable & Telecommc'ns Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("In *Chevron*, this Court held that ambiguities in statutes *within an agency's jurisdiction to administer* are delegations of authority to the agency to fill the statutory gap in reasonable fashion.") (emphasis added). Here, the Secretary undoubtedly "administers" Section 1143a. See 10 U.S.C. 1143a(a) ("The Secretary of Defense shall implement a program to encourage members and former members of the armed forces to enter into public and community service jobs after discharge or release from active duty."). Thus, his reasonable interpretations of that provision must be accorded deference.

Second, petitioner contends (Pet. 15) that "judicial deference * * * is not warranted under *Chevron* because the legislation at issue here did not leave it to the Secretary to fill gaps or elucidate general standards." That contention also rests on a misunderstanding of the Program. In *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001), this Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." Such "[d]elegation of * * * authority may be shown in a variety of ways," including "by an agency's power to engage in * * * notice-and-comment rulemaking." *Id.* at 227.

The Program is exactly the kind of administrative process *Mead* had in mind. Congress gave the Secretary, by way of the president, general authority to "prescribe regulations to carry out his functions, powers, and duties." 10 U.S.C. 121. Congress further directed the

Secretary to "implement a program to encourage members and former members of the armed forces to enter into public and community service jobs after discharge or release from active duty." 10 U.S.C. 1143a(a). And, as set forth above, Congress provided a vague definition of "public service and community service organization." 10 U.S.C. 1143a(g). The Secretary, employing his general power to "prescribe regulations" and his specific charge to "implement" the public and community service program, issued a notice-and-comment rulemaking to fill the gap in Congress' definition of "public service and community service organization." See 59 Fed. Reg. 40,809 (1994) (final rule).[2] That rulemaking, which carries the force of law, warrants deference under *Mead*.

2. The Due Process Clause of the Fifth Amendment "forbids the Federal Government to deny equal protection of the laws." *Vance* v. *Bradley*, 440 U.S. 93, 95 n.1 (1979). The court of appeals correctly concluded that the Program is consistent with equal protection.

a. A governmental classification is reviewed for a rational basis unless it "trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as * * * religion." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). The Program does neither.

The Program does not draw any suspect classification. Instead, the Program rests on a neutral foundation—effectuating Section 1143a's goal of filling vacancies in certain high-need sectors. See pp. 7-8, *supra*. To accomplish that objective, the Program exempts several general categories of employment: work for businesses, labor unions, and partisan political organizations, and

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[2] Petitioner is thus wrong to allege (Pet. 16) that "[t]he regulation at issue here did not result from any formalized administrative process."

religious instructions, worship services, or any form of proselytization. As the court of appeals recognized, "[t]he breadth of the exclusion suggests that the Secretary was not discriminating along religious lines." Pet. App. 19a.

Nor does the Program intrude on the fundamental right to free exercise of religion. As an initial matter, the Court need not consider this issue because petitioner did not even raise it in the district court. Petitioner's complaint never mentions free exercise, and his opposition to the motion to dismiss argued only that the Program drew a suspect classification. See Pl.'s Mem. in Opp. to Gov't Mot. to Dismiss 12 ("the [Program] makes a classification based upon religion"). Indeed, the district court recognized that petitioner "does not contend that [the Program] interferes with his fundamental right to freely exercise his religion." Pet. App. 45a.

In any event, although the court of appeals did address the issue, it correctly concluded that the Program does not interfere with the right to free exercise. That conclusion was a straightforward application of this Court's decisions in *Locke* v. *Davey*, 540 U.S. 712 (2004), and *Johnson* v. *Robison*, 415 U.S. 361 (1974). At issue in *Davey* was a college scholarship program operated by the State of Washington. 540 U.S. at 716. The program provided stipends for high-achieving high school graduates, with one exception: students could not use the scholarship to pursue a degree in theology. *Ibid.* The Court held that the program did not violate free exercise because it "impose[d] neither criminal nor civil sanctions on any type of religious service or rite." *Id.* at 720. Instead, "[t]he State ha[d] merely chosen not to fund a distinct category of instruction." *Id.* at 721. The Court thus "[could not] conclude that the denial of funding for

vocational religious instruction alone is inherently constitutionally suspect." *Id.* at 725.

At issue in *Robison* was the constitutionality of Congress' decision to extend education benefits to draftees who had served on active duty in the armed forces but not to draftees who had been relieved of active duty due to conscientious objections and had instead completed civilian service. See 415 U.S. at 362-364. The Court concluded that this scheme was constitutional because it imposed at most "an incidental burden" on the right of free exercise. *Id.* at 385. The provision of education benefits to veterans of the armed forces was meant "to advance the neutral, secular governmental interests of enhancing military service and aiding the readjustment of military personnel to civilian life," and conscientious objectors "were not included in this class of beneficiaries, not because of any legislative design to interfere with their free exercise of religion, but because to do so would not rationally promote the Act's purposes." *Ibid.*

For reasons similar to *Davey* and *Robison*, the Program does not interfere with the right to free exercise. It does not punish religious conduct or prevent anyone from engaging in such conduct because service members are free not to participate in the Program. The Program merely creates a category of benefits by providing early retirees with the option of working at certain public service and community service organizations, thereby advancing the neutral goal of boosting services in high-need sectors. Although the Program does not extend benefits for religious instructions, worship services, or any form of proselytization, any resulting burden on religion is incidental and does not implicate the Free Exercise Clause. Indeed, this Court has made clear that the government's "decision not to subsidize the exercise

of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Ysursa* v. *Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009) (citation omitted); see *Regan* v. *Taxation with Representation*, 461 U.S. 540, 549 (1983).[3]

b. Petitioner believes (Pet. 19-23) that *Davey* and *Robison* are not correct frames of reference for this case. Instead, according to petitioner, the court of appeals should have looked to this Court's decisions in *McDaniel* v. *Paty*, 435 U.S. 618 (1978), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963). As an initial matter, however, *Davey* found both *McDaniel* and *Sherbert* irrelevant to the constitutionality of Washington's scholarship program. See 540 U.S. at 720-721. Because this case and *Davey* are materially indistinguishable, *McDaniel* and *Sherbert* are also not relevant here. In any event, neither *McDaniel* nor *Sherbert* controls this case.

In *McDaniel*, the Court ruled that Tennessee had violated the Free Exercise Clause by barring ministers from serving as legislators or delegates at a constitutional convention. 435 U.S. at 629. Two competing rights were at stake in that case: on the one hand, the Free Exercise Clause protects "the right to preach, proselyte, and perform other similar religious func-

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[3] Notably, as the district court recognized, "the Program credits military personnel for their work at religious organizations, so long as the activities performed by the early retiree are unrelated to religious instructions, worship services, or any form of proselytization." Pet. App. 46a (citation omitted). So, for instance, an early retiree could get credit for doing health-care related work at a religious institution, as long as the work does not involve religious instructions, worship services, or proselytization. Petitioner is thus wrong to suggest that under the Program, "*any work* for an organization that engages in religious instruction, religious services or proselytization is disqualified." Pet. 23 (emphasis added).

tions," *id.* at 626; on the other hand, the Tennessee constitution protects "the right * * * to seek and hold office as legislators or delegates to the state constitutional convention," *ibid.* But "under the clergy-disqualification provision, [a minister could not] exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other." *Ibid.*

McDaniel thus involved an "either-or" situation. Either the plaintiff could exercise his right to free exercise, or he could exercise his right to serve in public office. But there was no way he could exercise both rights. For two reasons, the Program does not create a comparable dilemma. First, there is no issue of competing rights. Whereas in *McDaniel*, Tennessee had "encroached upon [the] right to the free exercise of religion" by "punishing a religious profession with the privation of [the] civil right [to run for office]," 435 U.S. at 626 (citation omitted), early retirees have no independent right to earn service credit. Thus, early retirees like petitioner, who choose to engage in "religious instructions, worship services, or any form of proselytization," are not deprived of any right to which they were otherwise entitled. They are merely ineligible for the optional service credit offered by the Secretary. Second, unlike *McDaniel*, the Program does not require early retirees to *surrender* religious activities in order to earn service credit. An individual can earn credit by working for a PACS-eligible organization and is also otherwise free to engage in activities that relate to "religious instructions, worship services, or any form of proselytization."

In *Sherbert*, the plaintiff was released by her employer because her religion forbade her from working on Saturdays; and for the same reason, she was unable to find other employment. 374 U.S. at 399. She applied for

benefits under South Carolina's unemployment-compensation scheme. That scheme did not authorize benefits if the applicant had "failed, without good cause . . . to accept available suitable work when offered," *id.* at 401, and the plaintiff was denied benefits because her restriction on working Saturdays was found not to be "good cause," *id.* at 399-402. The Court held that the plaintiff's free exercise right had been violated because "not only is it apparent that [her] declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable." *Id.* at 404. Thus, "[t]he ruling force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Ibid.*

Unlike the unemployment-compensation scheme in *Sherbert*, the Program here does not pressure, let alone force, anyone to surrender their religious conduct or practices. The burden it imposes on religious conduct is benign. As the court of appeals observed, petitioner "worked as a youth minister for pay and any loss of an incremental increase in his [military] retirement pay burdened him much less than losing unemployment compensation altogether." Pet. App. 17a.

c. "[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC* v. *Beach Commc'ns., Inc.*, 508 U.S. 307, 313 (1993). A regulation that has a "fair and substantial relation" to the object of the statute that the agency is interpreting categorically satisfies the rational basis

test. *Robison*, 415 U.S. at 374-375. Under those principles, the court of appeals correctly concluded that the Secretary's regulation has a valid rational basis.

As set forth above, *supra*, pp. 7-8, the Secretary's conclusion that work related to religious instruction, worship, and proselytization falls outside the category of activities for which Section 1143a(g) authorized retirement credit is a reasonable and lawful effort to follow congressional intent. The classification thus serves a rational basis. Because no other court of appeals has come to a contrary conclusion and because the decision below is consistent with this Court's precedent, further review is unwarranted.

3. Even if the foregoing issues were otherwise to warrant the Court's attention, the decision below is of little prospective significance, and further review of this case is unwarranted.

The time period for seeking retirement credit under the PACS Program has elapsed. Congress' final amendment of the Program's statutory authorization extended the Program until September 1, 2002, see Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 554, 116 Stat. 2553, and the last individual who retired under the temporary early retirement authority (TERA) relevant to this case left the armed forces on August 31, 2002. That person's period of eligibility for seeking a retirement credit closed on August 31, 2007. 32 C.F.R. 77.3(b). Pursuant to DoD instructions, a qualified retiree must complete all reporting of qualified periods of employment within one year. See DoD, *Instruction No. 1340.19, Certification of Public and Community Service Employment of Military Retirees* para. 5.3.3 (Nov. 17, 1993).

In light of the above facts, as of the end of calendar year 2008, the Secretary's Office of Military Personnel Policy ceased processing new applications for retirement credit and minimized or eliminated associated support for the Program. To that end, the TERA website was officially shut down on February 20, 2009. See *Special Announcement About the TERA Website* (visited July 7, 2009) <https://www.dmdc.osd.mil/tera/>.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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